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**In the
Supreme Court of the United States.**

OCTOBER TERM, 1978.

No. . **78-233**

**PERSONNEL ADMINISTRATOR OF THE
COMMONWEALTH OF MASSACHUSETTS ET AL.,**

APPELLANTS,

v.

HELEN B. FEENEY,

APPELLEE.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS.**

Jurisdictional Statement.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
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Jurisdictional Statement.

The Attorney General of the Commonwealth of Massachusetts, as attorney for the Personnel Administrator and the Massachusetts Civil Service Commission,¹ submits this state-

¹ Appellants have retained the original caption of the case below for ease of identification even though the parties and their designations have changed. See Statement of the Case, *infra*, pp. 5-10 (Commonwealth of Massachusetts and Division of Civil Service dismissed as parties), and n. 4, *infra* (designation of Director of Civil Service changed).

ment in support of the contention that a final order and decision of the United States District Court for the District of Massachusetts should be reversed. That decision once again² invalidated Mass. Gen. Laws c. 31, § 23, the so-called Massachusetts veterans' preference statute.

The appellants contend that the latest decision of the district court in this case is inconsistent with prior opinions of this Court, including the opinion in *Washington v. Davis*, 426 U.S. 229 (1976), which triggered this Court's previous order of remand for reconsideration, and that it should therefore be summarily reversed. In the alternative, the appellants submit that the decision was based on the application of incorrect standards of law and that it raises substantial questions requiring plenary consideration by this Court.

Opinions Below.

This case is before this Court for the third time. Appellants originally sought review of the opinion of the district court dated March 29, 1976, and reported at 415 F. Supp. 485 (D. Mass. 1976). Upon review of appellants' Jurisdictional Statement, this court certified a single question to the Supreme Judicial Court of Massachusetts. The question concerned the authority of the Attorney General to proceed with the appeal over the express objections of the nominal defendants. The

²As indicated in other portions of this statement, this cause has been before this Court for consideration on two other occasions. See pp. 8-9, *infra*. A previous jurisdictional statement was docketed on August 26, 1976. The matter was assigned number 76-265. Although the papers filed in that matter are presumably available to the Court, this Jurisdictional Statement is intended to be a self-contained document and reference to those papers should be unnecessary.

certified question is reported at 429 U.S. 66 (1976). The opinion of the state court in response to the certified question is dated September 16, 1977, and is not yet reported in the official Massachusetts Reports. It appears, however, at 366 N.E. 2d 1262.

This Court then remanded the cause to the district court for reconsideration in light of *Washington v. Davis*, 426 U.S. 229 (1976). The order of remand is reported at 434 U.S. 884 (1977). The opinion issued by the district court on remand is dated May 3, 1978, and is unreported. The opinions, judgment and order of the district court on remand are reproduced as an appendix to this statement (App. A).

Jurisdiction.

The present appeal is from a final order of a three-judge court of the United States District Court for the District of Massachusetts. That tribunal was convened pursuant to 28 U.S.C. §§ 2281 and 2284 upon the application of Helen B. Feeney, plaintiff-appellee, for a permanent injunction to restrain the enforcement, operation and execution of the Massachusetts veterans' preference statute. In the court below, Ms. Feeney sought an injunction and a declaratory judgment pursuant to 28 U.S.C. §§ 1331, 1343(3), 42 U.S.C. § 1983 and 28 U.S.C. § 2201, claiming that the statute extending preference to veterans in civil service employment in the Commonwealth, Mass. Gen. Laws c. 31, § 23, deprives women of equal consideration for public employment in violation of the Fourteenth Amendment.

The original opinion of the three-judge court was appealed to this Court, which in turn remanded the case with instructions to reconsider in light of *Washington v. Davis*, 426 U.S.

229 (1976). On May 3, 1978, the district court entered its judgment and order together with its opinion. The opinion reiterates the previous conclusion of the court that application of the veterans' preference statute had the predictable effect of excluding female applicants from the civil service system. The divided district court again declared the statute unconstitutional and again permanently enjoined the defendants from enforcing its provisions. A notice of appeal was filed with the district court on June 13, 1978. A copy of that notice is reproduced as an appendix to this statement (App. B).

Jurisdiction of this Court is conferred by 28 U.S.C. § 1253. Cases believed to sustain jurisdiction are: *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976); *United States v. Georgia Public Service Commission*, 371 U.S. 285 (1963); *Paul v. United States*, 371 U.S. 245 (1963); *Florida Lime and Avocado Growers v. Jacobsen*, 362 U.S. 73 (1960).

Statute Involved.

Although the suits filed in district court challenged Mass. Gen. Laws c. 31, §§ 21-25, only § 23 was found to be unconstitutional and it is the sole Massachusetts statute directly before this Court on appeal. At the time of the district court opinion³ Mass. Gen. Laws c. 31, § 23, provided:

The names of persons who pass examinations for appointment to any position classified under the civil service

³On June 24, 1976, the Governor of the Commonwealth signed into effect Mass. St. 1976, c. 200, a statute establishing an interim veterans' preference statute which would operate only during the pendency of this case. Mass. Gen. Laws c. 31, § 23 (Supp. 1978-1979). The new statute is set out as an appendix to this statement (App. C).

shall be placed upon the eligible lists in the following order: —

(1) Disabled veterans as defined in section twenty-three A, in the order of their respective standing; (2) veterans in the order of their respective standing; (3) persons described in section twenty-three B in the order of their respective standing; (4) other applicants in the order of their respective standing. Upon receipt of a requisition, names shall be certified from such lists according to the method of certification prescribed by the civil service rules. A disabled veteran shall be retained in employment in preference to all other persons, including veterans.

Question Presented.

Does the preference afforded veterans by Mass. Gen. Laws c. 31, § 23, violate the Equal Protection Clause of the Fourteenth Amendment?

Statement of the Case.

On November 4, 1974, Carol A. Anthony filed a civil complaint in the United States District Court for the District of Massachusetts, seeking to enjoin the enforcement of Mass. Gen. Laws c. 31, §§ 21-25.⁴ The complaint was accompanied

⁴Named as party defendants were the Commonwealth of Massachusetts, the Division of Civil Service, the Civil Service Commission and the Director of Civil Service. After commencement of the action but prior to decision, the

by an application for a temporary restraining order and an application to convene a three-judge district court pursuant to 28 U.S.C. §§ 2281 and 2284. A temporary restraining order was granted on November 4, 1974, and the application for a three-judge court was granted four days later.

The gravamen of the complaint was that the veterans' preference statute deprived the plaintiff of equal protection of the laws because it operated to exclude women from public employment and perpetuated the effect of sex discrimination established by federal regulation concerning military service. On May 19, 1975, the complaint was amended to include as additional plaintiffs Betty A. Gittes and Kathryn Noonan, who, like Ms. Anthony, were female non-veterans seeking employment as attorneys under the job description "Counsel I."

On May 20, 1975, Helen B. Feeney filed a complaint against the same defendants raising the same issues and alleging the same claims as plaintiff in the *Anthony* case. Ms. Feeney was employed by the Civil Defense Agency of the Commonwealth of Massachusetts from 1963 until March 28, 1975, first as a Senior Clerk Stenographer and then as Federal Funds and Personnel Coordinator. She was laid off on March 28, 1975. On May 22, 1975, Ms. Feeney, a non-veteran, sought a temporary order restraining the defendants from making or approving any appointment to any permanent position from the eligible list for positions classified as Administrative Assistant or Head Administrative Assistant at the Solomon Mental Health Center in the Department of Mental Health of the Commonwealth. The requested order further sought extension of the expiration date of the eligible list for the latter position. The order was assented to and duly entered, and on May 23, 1975, the court consolidated the two actions.

position of the Director of Civil Service was eliminated and its functions transferred to the Personnel Administrator of the Commonwealth, Mass. St. 1974, c. 835.

The defendants moved to dismiss the *Anthony* case as moot due to the passage of an act exempting all attorney positions, including those classified as Counsel I, from the provisions of civil service law, Mass. St. 1975, c. 134. They also moved to dismiss the *Feeney* case for want of subject matter jurisdiction and failure to state a claim upon which relief could be granted. Counsel executed lengthy statements of agreed facts, submitted simultaneous briefs on all issues, and presented oral argument to the three-judge panel on the merits.

On March 29, 1976, the three-judge district court issued the final order and opinions reproduced at 415 F. Supp. 485 (D. Mass. 1976). The court found that the claims brought by the plaintiffs in the *Anthony* case were mooted by the passage of the state statute exempting attorney positions from the operation of the civil service law and accordingly entered judgment for the defendants in that case. The court further found that neither the Commonwealth of Massachusetts nor the Division of Civil Service were "persons" within the meaning of 42 U.S.C. § 1983 and therefore dismissed the complaints against them. No notice of appeal was filed as to these aspects of the final judgment and order.

The Court permanently enjoined the remaining defendants⁵ from utilizing the veterans' preference statute in filling civil service positions within the Commonwealth. The sharply-divided court held that Mass. Gen. Laws c. 31, § 23, had the effect of depriving female civil service applicants of equal protection of the laws and was unconstitutional. The majority opinion clearly based this holding of an analysis of the impact rather than the purpose of the statute vis-a-vis female applicants. The dissent of Murray, D.J., strongly suggested that

⁵The remaining defendants are the Civil Service Commission and the Personnel Administrator, who supplanted the Director of Civil Service, n. 4, *supra*.

the impact analysis employed by the majority was not the proper means to assess the constitutionality of a state statute allegedly violating the Equal Protection Clause of the Fourteenth Amendment. Applying a rational basis test to the challenged statute, Judge Murray concluded that the veterans' preference law passed constitutional muster.

On May 25, 1976, the Attorney General of the Commonwealth filed a notice of appeal from the partial final judgment invalidating Mass. Gen. Laws c. 31, § 23. An application for a stay and a motion for relief from judgment pursuant to Rule 60(b)(6), Fed. R. Civ. P., accompanied the notice. Before a hearing was held on these motions, this Court rendered its decision in *Washington v. Davis*, 426 U.S. 229 (1976). On June 15, 1976, appellants filed a supplemental motion for relief from judgment, urging reconsideration in light of the intervening decision of this Court. A hearing was held on the motions and application for a stay on June 23, 1976. The motions for relief from judgment were denied from the bench, but the application for a stay pending appeal to this Court was orally allowed. At the request of plaintiff-appellee's counsel, formal action on the stay was delayed one day to permit the drafting of an order effectively reinstating the earlier temporary restraining order. The formal entry of the stay was rendered moot by the passage of an interim statute. See n. 3, *supra*. On June 28, 1976, the court entered an order denying the motions for relief from judgment but taking no action on the application for a stay.

An application for an extension of time to docket the appeal was filed with this Court on July 17, 1976, and allowed by order of Brennan, J., on July 20, 1976. The appellants docketed their appeal on August 23, 1976. Subsequently, the nominal defendants advised the Clerk of this Court by letter that the appeal was not authorized by them and that it was taken over their objection. Their request that the Court

dismiss the appeal was echoed in a motion to dismiss or affirm filed by the appellee and an *amicus curiae* brief in opposition to jurisdiction filed by the Commonwealth's Secretary of Administration and Finance "with the knowledge and approval of the Governor."

On November 8, 1976, this Court certified a single question to the highest court of the Commonwealth. In essence the question posed was whether the Attorney General had the authority to prosecute an appeal to this Court over the expressed objection of the named state defendants against whom judgment was entered. On September 16, 1977, the Supreme Judicial Court answered the question in the affirmative, confirming the authority of the Attorney General to appeal this particular case.

Upon receipt of this answer, this Court summarily disposed of the appeal. In a *per curiam* order dated October 11, 1977, the Court vacated the judgment below and remanded the case for further consideration in light of *Washington v. Davis*, 426 U.S. 229 (1976).⁶

Eight days after the remand, the District Court ordered the parties to submit briefs addressing the issues raised by the order of this Court. The Agreed Statement executed in 1975 was not updated and no further evidence was submitted, but the court did receive briefs and hear oral argument. On June 13, 1978, the district court, divided as it had been in its earlier opinion, found Mass. Gen. Laws c. 31, § 23, to be violative of the Equal Protection Clause of the Fourteenth Amendment.

The opinions and order appended to this statement do not differ markedly from those entered in 1976. The Court has again enjoined the individual defendants from utilizing the veterans' preference statute in filling civil service positions.

⁶Three justices would have noted probable jurisdiction and set the case for oral argument.

The majority opinion still is premised on an analysis of the impact of Mass. Gen. Laws c. 31, § 23, on distaff applicants. The brief concurrence distinguishes *Davis* and still adheres to the former opinion of the district court. The dissent of Murray, D.J., again states that the veterans' preference statute is facially neutral, is not motivated by discriminatory intent, and therefore must be judged according to the rational basis test. The posture of the case, therefore, is essentially the same as when it was last before this Court, except that each of the judges below has ostensibly reevaluated the case in accordance with the order of remand.

The Questions Presented are Substantial.

I. INTRODUCTION.

In seeking to demonstrate that substantial questions are presented by this statement, the appellants have broken their argument into two parts. First, the appellants show that the district court improperly treated the case on remand. Rather than undertake a searching inquiry into the intent behind the veterans' preference statute, as the holding of this Court requires, the lower court unconvincingly attempted to distinguish away the *Davis* decision, stating that this case does not involve facially neutral state action. This statement misconstrues the meaning of facial neutrality and is clearly erroneous.

Then the court, applying what it termed a "totality of the circumstances" test, isolated three factors which it thought justified a finding of discriminatory intent. Two of the three factors are based on the statute's impact, and the third is of marginal relevance on the issue of intent. The court then concluded that although Mass. Gen. Laws c. 31, § 23, was not

designed or motivated by a desire to harm women, the requirement of intent is met by the fact that the Massachusetts legislature was willing to accept a disproportionate impact on female civil service applicants as a cost of benefitting veterans. The decision of the district court is inconsistent with *Davis* both because it is based almost entirely on an impact analysis and because it misconceives the meaning of intent. Accordingly, summary reversal is appropriate.

In the second section, appellants demonstrate that even if the veterans' preference statute were an example of intentional gender-based discrimination, it would still meet constitutional standards. Application of the statute does not implicate a fundamental right or a suspect classification, and the law therefore should not have been subjected to a strict scrutiny analysis. The Massachusetts veterans' preference law rationally furthers legitimate state interests, and any questions as to the wisdom of the particular legislative policy are to be resolved in other forums. The district court's treatment of this case conflicts with traditional equal protection analysis and requires plenary consideration by this Court.

II. THE DISTRICT COURT DECISION ON REMAND CONFLICTS WITH *WASHINGTON V. DAVIS* AND REQUIRES SUMMARY REVERSAL.

A. *The Lower Court Erred in Determining that the Statute is Not Facially Neutral.*

In *Washington v. Davis*, 426 U.S. 229 (1976), this Court articulated the constitutional principle that a law or other state action which is neutral on its face does not violate the Equal Protection Clause solely because it has a disproportionate im-

pact on a discrete and insular minority. In reconsidering its prior decision after the order of remand, the lower court determined that this principle was inapplicable to the instant case because the Massachusetts veterans' preference law "is not facially neutral." App. A, p. 11a n. 7. This distinction is totally without merit. The conclusion that the statute is not facially neutral in terms of gender is inconsistent with the previous conclusions of the lower court, and also flies in the face of previous opinions of this and other tribunals.

Even a cursory reading of the challenged statute makes it clear, as the lower court has previously acknowledged,⁷ that the law is facially neutral in terms of gender. Although it distinguishes between veterans and non-veterans, the statute draws no line based on the sex of civil service applicants.⁸ All similarly situated males and females are treated equally under its terms, and under the standards previously enunciated by this Court, the statute is neutral on its face. *Geduldig v. Aiello*, 417 U.S. 484 (1974); *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976); *City of Los Angeles v. Manhart*, — U.S. —, 98 S. Ct. 1370 (1978).

Concededly, the benefits extended by Mass. Gen. Laws c. 31, § 23, are bestowed on a class composed largely of males. However, the fact that the application of the statute benefits

⁷In his original opinion, the judge writing for the majority stated, "[f]acially the Veterans' Preference is open to both men and women." *Anthony v. Massachusetts*, 415 F. Supp. 485, 498 (D. Mass. 1976) (Tauro, D.J.). The concurring opinion in the latest decision also appears to consider the law to be facially although not actually neutral: "The statute can be called facially neutral in that it does not make a division based strictly on sex." App. A, p. 17a n.*. (Campbell, C.J.).

⁸There has been no showing that the preference involved was enacted as a mere pretext to accomplish the goal of invidious discrimination against disaff civil service applicants. In fact, it appears to be beyond dispute that the law was not enacted for the purpose or with a motive to disqualify women from receiving civil service appointments. *Anthony v. Massachusetts*, *supra*, at 495; App. A, p. 6a.

more persons of one sex than the other does not obviate the statute's facial neutrality; analysis of a statute on its face and analysis of the statute as applied are two different things. It is pure sophistry to distinguish away this Court's holding in *Davis*, premised as it is on the inadequacy of impact alone to render facially neutral acts unconstitutional, by stating that an act is not facially neutral if it has a disproportionate impact. It would be inconsistent with the mandate of this Court to allow such circular reasoning to avoid the holding in *Davis*.

The significance of the statute's "facial neutrality" cannot be overstated. The district court indicated that the standards to be used in assessing neutral and non-neutral statutes differ markedly. Specifically, the court conceded that "foreseeability of impact" would not be an adequate standard in cases involving facially neutral statutes. App. A, p. 11a n. 7. Since foreseeability was the key to the lower court ruling in this case, see Part II, B, *infra*, the question of the facial neutrality of the statute may well be outcome-determinative. By way of illustration, each court which has recently assessed the constitutionality of veterans' preference legislation has recognized those laws to be gender-neutral. See, e.g., *Bannerman v. Department of Youth Authority*, 436 F. Supp. 1273 (N.D. Cal. 1977); *Branch v. Du Bois*, 418 F. Supp. 1128 (N.D. Ill. 1976); *Ballou v. State Department of Civil Service*, 148 N.J. Super. 112, 372 A. 2d 333 (1977). Each of them has also upheld the challenged statutes on constitutional grounds. At the very least, then, the lower court's treatment of the facial neutrality of Mass. Gen. Laws c. 31, § 23, presents a substantial question requiring plenary consideration.

B. *The District Court Improperly Concluded that the Veterans' Preference Statute is an Instance of Intentional Gender-Based Discrimination.*

In reconsidering their prior opinion in this case, the lower court majority only paid lip service to the central tenet of *Washington v. Davis, supra*. By stating that only intentional discrimination against minority groups violates the Equal Protection Clause, this Court has shifted the focus in constitutional cases from an assessment of discriminatory effect to a probing inquiry into motives. Disproportionate impact is not irrelevant to that inquiry, "but it is not the sole touchstone of an invidious . . . discrimination forbidden by the Constitution." *Id.* at 242. The courts are now required to conduct a "sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977). Often the impact of the challenged action provides an important starting point in the inquiry, but it is only in the rarest of cases that impact alone will suffice as proof of purpose. *Id.*

Here the majority opinion purports to look to evidence other than impact and to apply a "totality of the circumstances"⁹ test to determine the intent of the legislature in enacting the veterans' preference statute. Appellants submit, however, that on remand the court engaged once again in the now out-moded impact analysis which characterized its earlier opinion, and that if there was any reconsideration, it was in name only.

⁹ App. A, pp. 8a, 10a. The "totality of the circumstances" test appears to be derived from the "non-exhaustive" series of six standards enumerated in *Village of Arlington Heights, supra*, at 266-277. Significantly, only one of those six standards was mentioned by the district court, i.e., the impact of the official action.

The court premised its finding of intent on only three factors; two of these factors are a function of the statute's effect and the third is of marginal significance on the issue of intent. In the order cited by the majority opinion and considered herein, those factors are (1) the foreseeability of the statute's impact, (2) the lack of a demonstrable relationship between one's status as a veteran and one's job performance and (3) the actual impact of the statute. These factors, whether considered separately or in combination, are insufficient to establish discriminatory intent or motive.

1. Foreseeability of Impact.

At the heart of the lower court's analysis is the premise that the foreseeable impact of veterans' preference is the reduction of job opportunities for women, and that intent to discriminate against females can be inferred from that fact. The argument is that the number of female veterans is small, that the Massachusetts legislature was presumptively aware of that fact when it enacted the statute, and that the legislature intended the natural and foreseeable adverse effect on non-veteran females worked by veterans' preference. Apparently the lower court was applying a modified tort concept of foreseeability. But, the "principle applied in tort and criminal actions, that an actor is presumed to intend the natural and foreseeable consequences of his deeds, must yield to the entirely different considerations at work when a federal court is addressing an equal protection challenge to state legislation." App. A, p. 26a. The lower court's duty to look to other evidence under these circumstances is not satisfied by the mere application of "foreseeability of impact" test. Indeed, such a test was rejected by this Court in *Austin Independent School District v. United States*, 429 U.S. 990 (1976), and has been convincingly repudiated by other federal courts. See, e.g., *United States v. Texas Education Agency*, 564 F.2d 162, 168

(5th Cir. 1977); *United States v. City of Chicago*, 549 F. 2d 415 (7th Cir. 1977); *Guardians Assoc. of New York City Police Dept. v. Civil Service Commission*, 431 F. Supp. 526 (S.D. N.Y. 1977). It is conceded that veterans' preference will necessarily benefit more men than women, and it is presumed that the legislature was willing to accept this adverse effect as a consequence, however unfortunate, of a salutary program to benefit veterans. However, that is quite different from asserting that the statute was motivated by an anti-female animus.

2. Job-Relatedness.

The probative value of the second factor isolated by the court, the job-relatedness of statutes as a veteran,¹⁰ is grossly overstated in the majority opinion. If the only purpose served by Mass. Gen. Laws c. 31, § 23, were the promotion of an effective civil service system, then extension of a preference would be a departure from the norm which might be indicative of discriminatory motive. This is manifestly not the case with the veterans' preference statute, which was primarily intended to benefit qualified individuals for their prior service to the nation. By isolating this factor the court added little or nothing to the search for invidious discrimination based on gender and suggested that it failed to comprehend the difference between cases raising Title VII claims and those based on the Equal Protection Clause.

¹⁰Neither the dissenting justice nor the appellants concede that having served in the military is irrelevant to job performance. App. A, p. 25a (Murray, D.J., dissenting); *Feinerman v. Jones*, 356 F. Supp. 252, 260 (M.D. Pa. 1973).

3. Impact.

Like foreseeability and job-relatedness, a statistical analysis of the impact of Mass. Gen. Laws c. 31, § 23, provides no support for an inference of intent. This case presents facts which are a far cry from the stark pattern of discrimination which in and of itself requires a finding of purposeful deprivation of constitutional rights. The Massachusetts veterans' preference law is not now and never has been an insurmountable barrier to women seeking employment with the Commonwealth, and the evidence before the lower court did not even indicate a "gross statistical disparity" between the number of male veterans and females hired by Massachusetts. See, *Hazelwood School District v. United States*, 433 U.S. 299 (1977). While one can hardly argue that the preference extended to veterans is insignificant, the record below shows that more non-veterans were hired in the Commonwealth's official service¹¹ during the relevant period than veterans, and that non-veteran females hired actually outnumbered male veterans. Furthermore, until the influx of veterans into the job market in the post-Viet Nam era, the statute did not prevent the plaintiff herself from obtaining meaningful civil service employment. In light of these facts, it is clear that application of the veterans' preference statute does not produce results so

¹¹The statistics which were included in the record before the court below relate primarily to the "official service" of the Commonwealth. The official service is but one of two components of the state's civil service system, which itself does not include all positions in state service. At the time the Agreed Statement of Facts was executed below, fully 40 per cent of all state jobs were not civil service positions and were not subject to Mass. Gen. Laws c. 31, § 23. Thus, other than facts pertaining to the plaintiff's particular application history, some unquantified general statements and an analysis of selected lists, the basis for the decision below was a statistical analysis of one minor portion of state service in which 43 per cent of those appointed during the sample period were females.

grossly disproportionate that intentional discrimination was proved. *Compare, Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

The inadequacy of these three factors to support a finding of purposeful or intentional discrimination is reflected in the actual language of the district court opinion. The lower court has not found that the veterans' preference law was motivated by a desire to discriminate against females. Indeed, the district court has repeatedly acknowledged the lack of such intent. In its earlier opinion, the court stated that "[t]he Massachusetts Veterans' Preference was not enacted for the purpose of disqualifying women from receiving civil service appointments." *Anthony v. Massachusetts*, 415 F. Supp. at 495. That thought is echoed in the court's latest opinion, where the concurring judge wrote, "To be sure, the legislature did not wish to harm women." App. A, p. 19a.

On the contrary, the essence of the decision is that the legislature's "clear intent" in passage of the veterans' preference "was to benefit veterans even [if the benefits came] at the expense of [female job applicants]." App. A, p. 6a. The legislature's apparent willingness to accept an adverse impact on women as a corollary of extending benefits to veterans has thus been equated with intent or motive in the eyes of the court. As the dissenting judge notes, such a conclusion "says nothing about motive and is entirely consistent with a finding that the legislature saw the impact on women as extremely regrettable but unavoidable." App. A, p. 29a n. 9.

Here both the standards utilized by the district court and its ultimate finding of intent are inconsistent with the holdings in *Davis* and *Arlington Heights*. The Massachusetts veterans' preference law is a neutral statute which has natural but

unintentional adverse side effects on women.¹² Given the standards previously articulated by this Court for such cases and the holding of the court below, summary reversal is warranted.

III. THE MASSACHUSETTS VETERANS' PREFERENCE STATUTE RATIONALLY PROMOTES LEGITIMATE STATE INTERESTS AND IS, THEREFORE, CONSTITUTIONAL.

Having determined that *Washington v. Davis, supra*, is distinguishable from this case and, in the alternative, that the veterans' preference statute intentionally discriminates against women, the lower court found it unnecessary to reconsider and revise its earlier opinion. A finding of intent, however necessary it may be to a determination of a violation of the Fourteenth Amendment, should not terminate a court's equal protection analysis. On the contrary, a finding of intent is merely a condition precedent to the commencement of that analysis. In the instant case the district court undertook no new analysis, and the arguments presented herein are addressed primarily to the prior opinion appearing at 415 F. Supp. 485 (D. Mass. 1976).

Traditional equal protection analysis requires strict scrutiny of a legislative classification only if it impermissibly interferes

¹²See dissenting opinion of Murray, D.J., at App. A, pp. 22a-23a:

The attempted distinction between the test in *Davis* and the statute here is totally unconvincing: one is no more neutral than the other. In each case the classification is facially neutral, and in operation the effects are uneven; the only difference is that the statute here has a weightier impact on the relevant group, and impact alone is not determinative, *Washington v. Davis, supra*, at 239. [Footnote omitted.]

with a fundamental right¹³ or impinges on the rights of a suspect class.¹⁴ *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976). Other state classifications are examined under the rational basis standard, "a relatively relaxed standard reflecting the Court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one." *Id.* at 314.

The opinion of the district court proceeded from a recognition of the fact that there is no fundamental right to public employment. 415 F. Supp. at 499. Furthermore, the lower court found it unnecessary to determine whether classifications based upon sex are suspect, 415 F. Supp. at 495,¹⁵ choosing instead to base its opinion on the impact of the statute on women. Because neither a fundamental right nor a suspect classification was involved, a rational basis test rather than a strict scrutiny test should have been applied. However, the court did not apply a rational basis test. While it is unclear what test was applied, the majority opinion discloses that the court engaged in a "least restrictive alternative" inquiry.¹⁶

¹³ Among the fundamental rights requiring application of a strict scrutiny standard are the right to equal access to the vote, *Bullock v. Carter*, 405 U.S. 134 (1972); freedom of speech and association, *Williams v. Rhodes*, 393 U.S. 23 (1968); and the right of interstate travel, *Shapiro v. Thompson*, 394 U.S. 618 (1969).

¹⁴ Only three classifications have been found suspect by the Supreme Court. They are race, *McLaughlin v. Florida*, 379 U.S. 184 (1964); ancestry or national origin, *Oyama v. California*, 332 U.S. 633 (1948); and alienage, *Graham v. Richardson*, 403 U.S. 365 (1971).

¹⁵ This Court "has never viewed [sex] classification as inherently suspect or as comparable to racial or ethnic classifications for the purpose of equal protection analysis." *Regents of University of California v. Bakke*, 46 U.S.L.W. 4896, 4905 (June 27, 1978). Accordingly, sex classifications are not judged by the compelling state interest test. *Craig v. Boren*, 429 U.S. 190, 197 (1976).

¹⁶ "[T]he fact is that there are alternatives available to the state to achieve its purpose of aiding veterans, without doing so at the singular expense of

That test is a corollary of strict scrutiny and is only appropriate where fundamental constitutional rights or liberties are at stake. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 51 (1973).

Had the three-judge district court applied a rational basis test, the statute clearly would have withstood judicial scrutiny. With the exception of the decision of the court below, veterans' preference statutes have been uniformly upheld by the federal courts whenever challenged as a violation of the Equal Protection Clause. *Branch v. Du Bois*, 418 F. Supp. 1128 (N.D. Ill. 1976); *Rios v. Dillman*, 499 F. 2d 329 (5th Cir. 1974); *Feinerman v. Jones*, 356 F. Supp. 252 (M.D. Pa. 1973); *Koelfgen v. Jackson*, 355 F. Supp. 243 (D. Minn. 1972), *aff'd mem.* 410 U.S. 976 (1973); *Russell v. Hodges*, 470 F. 2d 212, 218 (2d Cir. 1972). See, also, *Ballou v. State Department of Civil Service*, 148 N.J. Super. 112, 372 A. 2d 333 (1977). The courts have reached such decisions on the basis of traditional equal protection analysis "which requires only that the State's system be shown to bear some rational relationship to legitimate state purposes." *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 40 (1973).

It is beyond dispute that the Commonwealth has legitimate state interests which are served by veterans' preference. The original majority opinion of the district court states:

another identifiable class, its women. . . . Given the fact that effective, but less drastic, alternatives are available, the state may not give an absolute and permanent preference in the area of public employment to its veterans at the expense of its women who, because of circumstances totally beyond their control, have little if any chance of becoming members of the preferred class." *Anthony v. Massachusetts*, 415 F. Supp. 485, 499 (D. Mass. 1976).

On remand the majority again stated: "The fact that there are less drastic alternatives available to the state to achieve its purpose of aiding veterans, underscores our conclusion that the absolute and permanent preferences adopted by the Commonwealth resulted from improper evaluation of competing considerations." App. A, p. 16a.

Massachusetts, like other states, and like the federal government, has consistently provided preferential treatment in public employment to those who have served in the nation's armed forces. . . . The modern Veterans' Preference Statute has its roots in legislation enacted in the seventeenth century and represents a key phase of the Commonwealth's continuing efforts on behalf of veterans. The program is designed to encourage service in the armed forces, reward those whose lives have been disrupted because they have served, and provide some assistance during the sometimes uneasy transition from military to civilian life.

Nothing in the Fourteenth Amendment prohibits Massachusetts from providing special treatment to veterans in considering candidates for public employment. . . . Such a policy responsibly recognizes both the special problems of veterans and the need to promote an important aspect of the nation's welfare. 415 F. Supp. at 496-497. (Footnotes and citations omitted.)

The legitimate state interests furthered by the veterans' preference statute are to reward veterans who have served their country in time of war, to rehabilitate and relocate veterans whose lives have been disrupted by military service, and to recognize that valuable work qualities gained in the military are conducive to public service. *Anthony v. Massachusetts*, 415 F. Supp. 485, 496 (D. Mass. 1976); *Feinerman v. Jones*, 356 F. Supp. 252, 259 (M.D. Pa. 1973). In theory Mass. Gen. Laws c. 31, § 23, is remedial legislation, intended to benefit a class of individuals, most of whom are males, who have borne the brunt of the nation's defense. In *Regents of University of California v. Bakke*, 46 U.S.L.W. 4896 (June 27, 1978), this Court recognized the constitutional validity of

facially non-discriminatory remedial preferences when applied without invidious intent.¹⁷

By its operation, the Massachusetts veterans' preference statute seeks to accommodate the provision of benefits to those who have served in the military with the need of the Commonwealth for an effective work force. It may be argued that Mass. Gen. Laws c. 31, § 23, only roughly accommodates these sometimes conflicting interests and that it could have been more wisely drawn. Indeed, although most states and the federal government have enacted statutes designed to afford veterans an employment preference, none of those other statutes is drafted in precisely the same fashion as the Massachusetts law. Nevertheless, judgments as to the wisdom of a state statute and determinations related to the accommodation of competing interests are uniquely amenable to legislative rather than judicial resolution. *Kahn v. Shevin*, 416 U.S. 351, 356 n. 10 (1974). *Accord*, *Massachusetts Board of Retirement v. Murgia*, *supra*; *Dandridge v. Williams*, 397 U.S. 471 (1970); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

Because the Massachusetts law rationally promotes legitimate state interests without infringing on fundamental rights or the rights of a suspect class, the lower court should not have substituted its judgment for that of the General Court by engaging in a search for a less restrictive alternative. Even

¹⁷In *Bakke*, the fatal defect of the medical school admissions policy was that it acted to foreclose non-minorities totally from consideration solely because of race. Significantly, the Court acknowledged that race or ethnic background was a factor which could be deemed a plus in a remedial entrance program. The Massachusetts veterans' preference scheme is a remedial program that does not totally foreclose civil service employment opportunities for women. The preference is merely one factor to be considered in an elaborate civil service program, but in no way requires ultimate appointment. *Compare*, *Morton v. Mancari*, 417 U.S. 535 (1974), where an Indian qualifying for a preference must be hired over a non-Indian.

if it had properly found the provisions of Mass. Gen. Laws c. 31, § 23, to intentionally discriminate against females, the district court still should have applied a rational basis test to the challenged statute and upheld it on constitutional grounds.

Conclusion.

The questions presented by this statement are substantial. Appellants respectfully urge this Court to reverse summarily the decision of the district court or to note probable jurisdiction and set the case down for argument.

Respectfully submitted,
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Appendix A.

UNITED STATES DISTRICT COURT DISTRICT OF MASSACHUSETTS

HELEN B. FEENEY

v.

CIVIL ACTION
 No. 75-1991-T

THE COMMONWEALTH OF
 MASSACHUSETTS, ET AL.

Judgment and Order.

May 3, 1978.

TAURO, D.J.

1. Judgment is entered in favor of the Commonwealth of Massachusetts and the Division of Civil Service in *Feeney v. Commonwealth*, CA 75-1991-T, because these defendants are not "persons" within the meaning of 42 U.S.C. § 1983. *Anthony v. Commonwealth*, 415 F. Supp. 485, 487, n. 2 (D. Mass. 1976).

2. Judgment is entered in favor of the plaintiff Feeney in No. 75-1991-T, against the Massachusetts Director of Civil Service and the members of the Massachusetts Civil Service Commission on the ground that Mass. Gen. Laws ch. 31, § 23 (1971) (The Massachusetts Veterans' Preference Act) is unconstitutional in that it operates to deny female civil service applicants equal protection of the laws.

It is ORDERED that:

(a) The Massachusetts Director of Civil Service and the members of the Massachusetts Civil Service Commission are

hereby permanently enjoined from utilizing Mass. Gen. Laws ch. 31, § 23 (1971) in any future selection of persons to fill civil service positions with the Commonwealth.

(b) This injunction shall have no effect upon the continued status of any individual in a permanent civil service position who holds that position on the date of this injunction.

LEVIN H. CAMPBELL,
Circuit Judge.

JOSEPH L. TAURO,
District Judge.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

HELEN B. FEENEY,
PLAINTIFF,

v.

CA 75-1991-T

COMMONWEALTH OF
MASSACHUSETTS, ET AL.
DEFENDANTS

Opinion.

May 3, 1978.

TAURO, D.J.

By order of remand from the Supreme Court, we have been instructed to reconsider our decision in *Anthony v. Common-*

wealth,¹ 415 F. Supp. 485 (D. Mass. 1976), in light of the Court's subsequent decision in *Washington v. Davis*, 426 U.S. 229 (1976).² After further briefing and oral argument, we conclude that *Davis* does not require us to alter our original holding. To the contrary, we have determined that both *Davis* and the Court's later opinion in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), support our conclusion that the challenged Massachusetts Veterans' Preference statute³ deprives women

¹ This case, originally entitled *Anthony v. Commonwealth*, was brought as two separate actions under 42 U.S.C. § 1983 by four Massachusetts women challenging the Veterans' Preference statute, Mass. Gen. Laws ch. 31, § 23. The plaintiffs in *Anthony* were three non-veteran women, admitted to the Massachusetts bar, who had applied for positions as counsel to state agencies. Plaintiff Feeney, in a separate suit, sought an administrative post in the civil service. The two suits were consolidated. We determined that the claims brought by the plaintiffs in *Anthony* were rendered moot by passage in April, 1975 of Mass. Gen. Laws ch. 31, § 5, which removed all appointments for state and municipal legal positions from the provisions of the state civil service law. We considered plaintiff Feeney's claim on the merits. Our decision in the *Feeney* case is the subject of the court's remand order presently before us.

² Also before the court is plaintiff's motion to amend the complaint to add a cause of action challenging the Veterans' Preference Act as violative of the Equal Rights Amendment to the state constitution, ratified in November, 1976, several months after our original opinion had issued. Plaintiff's motion raises several important issues, namely whether an amendment to the complaint would be within the scope of the Court's order of remand, whether the doctrine of abstention would require us to certify plaintiff's claim to the Massachusetts Supreme Judicial Court, and whether we would be obliged to consider the state claim prior to reaching the federal constitutional issue in this case.

Plaintiff asserts as a basis for the motion that, in the event her federal claims are rejected, she may be estopped from bringing a separate suit based on the state claim. At oral argument, however, the Commonwealth stipulated that it would not seek to raise the defense of estoppel with respect to plaintiff's state claim should there be a subsequent proceeding in the state court. Having in mind the Commonwealth's stipulation, we deny plaintiff's motion to amend. Fed. R. Civ. P. 15(a).

³ Mass. Gen. Laws ch. 31, § 23.

of equal protection of the laws and, therefore, is unconstitutional.⁴

I

THE ANTHONY DECISION.

The broad issues in this case are treated extensively in our prior opinion. 415 F. Supp. 485. In order to put in context our reconsideration of *Anthony*, however, it is useful to outline briefly some of its major points.

The statutory scheme challenged in *Anthony* established a formula that permanently prevents a non-veteran from achieving a place on the civil service appointment list ahead of a veteran, regardless of comparative test scores.⁵ We pointed

⁴In *Anthony*, we enjoined enforcement of Massachusetts Veterans' preference statute, Mass. Gen. Laws ch. 31, § 23, because it deprived women of equal protection under the law. The state subsequently filed a motion for relief from judgment, urging reconsideration in light of *Davis*. That motion, along with a motion for relief from judgment pursuant to Fed. R. Civ. P. 60(b)(6), was denied, although a stay pending appeal was granted. The stay was rendered moot by the passage of an interim statute, Stat. 1976, c. 200, which suspends operation of the challenged statute pending the outcome of this case on appeal. The interim statute is presently in effect and provides a modified point preference for veterans.

⁵An applicant who passes the civil service written examination becomes an eligible and is placed on an "eligible list" under the following ranking formula:

1. Disabled veterans in order of their composite scores.
2. Other veterans in order of their composite scores.
3. Widows and widowed mothers of veterans in order of their composite scores.
4. All other eligibles in order of their composite scores.

Mass. Gen. Laws ch. 31, § 23; *Anthony v. Commonwealth*, 415 F. Supp. 485, 488 (D. Mass. 1976).

The full statutory procedure by which eligible applicants are certified and selected is set forth in our original opinion. 415 F. Supp. at 488-490.

out that "(a)s a practical matter . . . the Veterans' Preference replaces testing as the criterion for determining which eligibles will be placed at the top of the list." 415 F. Supp. at 489.

The selection formula, geared as it is to veteran status, is necessarily controlled by federal military proscriptions limiting the eligibility of women for participation in the military. Long-standing federal policy limited to 2% the number of women who could participate in the armed forces. *Anthony v. Commonwealth*, *supra*, at 489. Traditionally, enlistment and appointment criteria have been more restrictive for women than for men.⁶ An inevitable consequence of this federal policy limiting women's participation in the military is that only 2% of Massachusetts veterans are women. *Id.*

(T)he practical consequence of the operation of these federal military proscriptions, in combination with the Veterans' Preference formula is inescapable. Few women will ever become veterans so as to qualify for the preference; and so, few, if any, women will ever achieve a top position on a civil service eligibility list, for other than positions traditionally held by women.

Id. at 490.

We recognized that the prime legislative motive of the challenged statute, that of rewarding public service in the military was worthy. *Id.* at 496. But we also observed that,

⁶A complete summary of the limitations placed on women seeking entry into the armed forces is set forth in our earlier opinion. 415 F. Supp. at 489-90.

(i)t is not enough that the prime objective of the Veterans' Preference statute . . . is legitimate and rational. The means chosen by the state to achieve this objective must also be legitimate and rational.

Id. at 497.

We determined that the means chosen by the Massachusetts Legislature to reward veterans were not grounded "on a convincing factual rationale." *Id.* at 495. We pointed out that the challenged statutory formula was not an effort by the state to set priorities for finite resources; that there were less drastic alternatives available to the state, such as a point system; and that any argument attempting to relate the challenged formula to job performance or qualification was "specious." *Id.* at 495-499. We concluded that the formula relegated job-related criteria and professional qualifications to a secondary position. *Id.* at 497.

Moreover, we emphasized that the challenged preference was absolute and permanent. No time limit was imposed or attempt made "to tailor its use to those who have shortly returned to civilian life." *Id.* at 499. Such a broad-brush approach may be administratively convenient, but mere administrative convenience is not a legitimate basis for benefiting one identifiable class at the expense of another. *Reed v. Reed*, 404 U.S. 71 (1971).

Although the Veterans' Preference statute was not designed for the sole purpose of subordinating women, *Anthony v. Commonwealth*, *supra*, at 495, its clear intent was to benefit veterans even at the expense of women. As we stated,

(T)he formula's impact, triggered by decades of restrictive federal enlistment regulations, makes the operation of the Veterans' Preference in Massachusetts anything but

an impartial, neutral policy of selection, with merely an incidental effect on the opportunities for women.

Id. at 495. Rather, we found the preference formula to be

a deliberate, conscious attempt on the part of the state to aid one clearly identifiable group of its citizens, those who qualify as veterans, . . . at the absolute and permanent disadvantage of another clearly identifiable group, Massachusetts women.

Id. at 496.

The consequences of adopting a permanent absolute preference formula tied to federal enlistment restrictions were more than predictable, they were inevitable.

II

THE IMPACT OF DAVIS ON ANTHONY.

At issue in *Davis* was a pre-employment literacy test used by the District of Columbia police department. The district court rejected plaintiffs' allegation that the test was "culturally slanted" to favor whites. It determined further that the test was "reasonably and directly" related to the requirements of the police recruit training program, although unrelated to actual job performance. 426 U.S. at 235. The D.C. Circuit reversed, holding irrelevant the failure of plaintiffs to allege and prove discriminatory intent in the exam's design and administration. It determined that the disproportionate percentage of blacks who had failed the exam sufficed to establish a constitutional violation. *Id.* at 236-37.

In reversing the court of appeals, the Supreme Court stated that claims of invidious discrimination under the fifth or fourteenth amendments require proof of a discriminatory purpose. A facially neutral statute may not be deemed vulnerable to equal protection challenge solely because it has a disproportionate impact. That Court emphasized that discriminatory intent need not be "express or appear on the face of the statute." 426 U.S. at 241, but that consideration must be given to the totality of the circumstances. Disproportionate impact is one such highly relevant circumstance we must consider.

Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another. It is also not infrequently true that the discriminatory impact . . . may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds. Nevertheless, we have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution.

426 U.S. at 242. See also *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977). This point was amplified by Justice Stevens in his concurring opinion.

Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds. This is particularly true in the case of governmental action which is frequently the product of compromise, of collective decisionmaking, and of mixed motivation.

Id. at 252 (Stevens, J., concurring). See also *Dayton Board of Education v. Brinkman*, 97 S. Ct. 2766 (1977) (Stevens, J., concurring).

A major factor distinguishing *Davis* from the case at hand is the nature of the selection procedure challenged in each case. Although the plaintiffs in *Davis* originally challenged the entire District of Columbia police recruitment scheme, the sole issue before the Supreme Court was the validity of the written civil service test. *Washington v. Davis*, *supra*, at 233-35.

The district court in *Davis* determined that the challenged test was neutral on its face. *Id.* at 235. This determination apparently provided a basis for the Court's statement that,

A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.

Id. at 248. (Footnotes omitted.)

The factual underpinning in this case is entirely different. As we have already emphasized, the Veterans' Preference statute is "anything but an impartial, neutral policy of selection with merely an incidental effect on the opportunities for women." 415 F. Supp. at 495. Here, plaintiff does not challenge the civil service written examination but, rather, the overriding ranking formula that mandates an absolute job preference to veterans over non-veterans, regardless of comparative test scores. This preference formula effectively "replaces testing as the criterion for determining which eligibles will be placed at the top of the list." *Id.* at 489.

In analyzing the "totality of the relevant facts" so as to determine the legislative intent underlying the challenged statute, we must of necessity examine official acts or policies to determine whether they had the natural, foreseeable and inevitable effect of producing a discriminatory impact.⁷ See

⁷ Defendants assert that a "foreseeability test" violates the mandate in *Davis*. Specifically, defendants rely on the Court's remand in *Austin Independent School District v. United States*, 429 U.S. 990 (1977), for the proposition that "inferences about intent flowing from arguably foreseeable consequences is not a substitute" for inquiry into specific intent. Defendants' Reply Brief at 7.

An order of remand is ambiguous in import. Justice Powell's concurrence suggests the remand in *Austin* may have been prompted by the breadth of the remedial relief ordered. 429 U.S. at 991, 992. See also *School District of Omaha v. United States*, 97 S. Ct. 2905 (1977); *Dayton Board of Education v. Brinkman*, 97 S. Ct. 2766 (1977). We will not presume that the Court utilized a remand order in *Austin* to abrogate the basic precept that a person is deemed to intend the natural, probable and foreseeable consequences of his actions. Nothing in *Davis* would indicate rejection in equal protection cases of this long-standing principle. See *Arthur v. Nyquist*, 429 F. Supp. 206, 210 (W.D. N.Y. 1977). Indeed, the Court recognized the difficulty of direct proof of intent, stating that the discriminatory purpose need not be express or appear on the face of the statute. 426 U.S. at 241. Moreover, Justice Stevens' concurrence suggests that this precept has continued vitality. *Id.* at 253 (Stevens, J., concurring).

Washington v. Davis, *supra*, at 253 (Stevens, J., concurring); *N.A.A.C.P. v. Lansing Board of Education*, 559 F.2d 1042 (6th Cir. 1977).

The legislature was, at the least, chargeable with knowledge of the long-standing federal regulations limiting opportunities for women in the military,⁸ and the inevitable discriminatory consequences produced by their application to the challenged formula.⁹

Defendants cite two cases where the "foreseeability test" was considered and rejected. *United States v. City of Chicago*, 549 F.2d 415 (7th Cir. 1977); *Guardians Ass'n of the New York City Police Dep't v. Civil Service Comm'n*, 431 F. Supp. 526 (S.D. N.Y. 1977). These cases are clearly distinguishable. In both, the challenged procedures were found to be neutral. Here, we have determined the challenged statutory scheme to be "anything but an impartial, neutral policy of selection." 415 F. Supp. at 495.

We do not hold that in all cases a plaintiff may attempt to circumvent the intent requirement of *Davis* solely by presenting proof of foreseeability of impact. We are dealing here with a statute that is not facially neutral. Moreover, it has an inevitable discriminatory impact on a clearly identifiable class. These are relevant facts to consider in determining underlying legislative intent.

⁸ See *Anthony v. Commonwealth*, 415 F. Supp. 485, 489-90 (D. Mass. 1976).

⁹ The legislative history does suggest an awareness on the part of the lawmakers of the predictable discriminatory impact the preference formula would have on women. Until 1971, most of the veterans' preference statutes and civil service regulations included provisions approving the practice of requisitioning only female applicants for certain positions. Jobs for which women were requisitioned were exempted from operation of the statute. See Mass. Gen. Laws ch. 31, § 23 (1966); Acts 1922, ch. 463; Acts. 1919, ch. 150, § 2; Acts 1895, ch. 501, § 2. Although the 1895 statute on its face appears to exempt women from the operation of the veterans' preference with respect to all available jobs, the prior and subsequent legislative history suggest that the statutory language was merely consistent with the pre-existing rule permitting single sex lists. See Civil Service Rule XIX(3) promulgated pursuant to Stat. 1884, Ch. 320. If a request were made for a female applicant, the Commissioner had no authority to certify a male for the position, regardless of his veteran status. Op. Att'y Gen. 68 (1941). In 1971, the legislature repealed this statutory exemption. Acts 1971, ch. 219.

In practical application, the combination of federal military enrollment regulations with the Veterans' Preference is a one-two punch that absolutely and permanently forecloses, on average, 98% of this state's women from obtaining significant civil service appointments.

Anthony v. Commonwealth, supra, at 498.

We must also assume that the legislature was cognizant of the fact that the stringent entry criteria embodied in the federal military regulations bore "no demonstrable relation to an individual's fitness for civilian public service." *Id.* at 498-99. We realize that a due process or equal protection claim is not to be judged by the standards applicable under Title VII. *Washington v. Davis, supra*, at 239. Our holding that the Massachusetts civil service selection process is unconstitutional is not based solely on the fact that it bears no relationship to job performance. But the fact that the criteria set forth in the challenged statutory formula fail to measure job performance is one additional circumstance bearing on the question of discriminatory intent.¹⁰

Statistics show that the exemption operated only to preserve stereotypically "female" clerical jobs for women. See 415 F. Supp. at 488. Contrary to defendants' assertion, elimination of this exception did not remove the last vestiges of sex discrimination from the statutory scheme; it only served to make all positions in the civil service subject to the overriding preference formula. See Comment *Veterans' Public Employment Preference as Sex Discrimination*, 90 Harv. L. Rev. 805, 812 (1977); Fleming and Shanor, *Veterans' Preferences in Public Employment: Unconstitutional Gender Discrimination?*, 26 Emory L.J. 13, 53 (1977).

¹⁰ It is significant to note that the Court in *Davis* adopted the finding of the district court that the challenged test "directly related to the requirements of the police training program." 426 U.S. at 235.

Finally, the statistical evidence presented by plaintiff demonstrates a pattern of exclusion of women from the civil service.¹¹ At the time the suit was filed, only 2% of Massachusetts veterans were women.¹² Although 43% of the civil service appointees were women, a large percentage of them served in lower grade positions for which men traditionally did not apply. Of the women appointed over a ten year period, from July 1, 1963 through June 30, 1973, only 1.8% were veterans, while 54% of the men had veteran status. 415 F. Supp. at 488.

The facts demonstrate that this absolute job preference formula had a devastating impact on the plaintiff's attempts to advance her position in the civil service. In 1971, she received the second highest test score for the position of Assistant Secretary to the Board of Dental Examiners, but was ranked sixth on the list of eligibles, behind five male veterans, four of whom had received lower scores. She was not certified and a male veteran with a lower examination score was appointed.

Two years later when she applied for another administrative post, plaintiff received the third highest mark on the exam, but only ranked fourteenth on the list, behind twelve

¹¹ Plaintiff argues that this statistical presentation of itself creates a presumption of purposeful discrimination, thereby shifting the burden of proof to defendants. See *Castaneda v. Partida*, 430 U.S. 482 (1977); *Washington v. Davis*, 426 U.S. 229, 241 (1976). In view of our subsidiary and ultimate findings and conclusions, based on an uncontradicted record, concerning the existence of discriminatory intent, we conclude that plaintiff has met her burden of proof without the benefit of a presumption and, therefore, find it unnecessary to address this procedural issue.

¹² At oral argument the parties stated that there is no reason to revise the agreed statement of facts submitted in *Anthony*. Moreover, there is no reason to assume that the facts have changed measurably, inasmuch as the challenged statute has not been in effect due to passage of the interim point preference statute. See n. 2, *supra*.

male veterans, eleven of whom had lower test scores. Again, plaintiff was not certified for appointment. The third time she applied for an administrative position, plaintiff received a score that would have placed her within the top twenty places on the eligibles list. By operation of the formula, however, she was ranked 70th on the list, behind 50 male veterans with lower test scores. *Id.* at 497-498.

These figures, and others cited in our earlier opinion,¹³ show a clear pattern of exclusion of women from competitive civil service positions. Unlike the defendants in *Davis*, the Commonwealth has not made any showing of affirmative efforts to recruit women, or of a recent rise in the percentage of women appointed to competitive civil service positions. In *Davis* the district court found that 44% of the new police recruits over the preceding three years had been black, a figure roughly approximating the proportion of blacks in the area. That court also found that the Department had "systematically and affirmatively sought to enroll black officers, many of whom passed the test but failed to report for duty." 426 U.S. at 236.

The situation here is in marked contrast. The Commonwealth's proffered 57-43 ratio of men to women is misleading. A large percentage of female positions for which males traditionally have not applied. Some women received their appointments through a now defunct practice by which the appointing authorities would requisition only women applicants for certain jobs. 415 F. Supp. at 488.¹⁴ While the officials in *Davis* sought "systematically" to recruit minorities who had passed the preemployment test, the defendants here have demonstrated no attempt to mitigate the permanent and absolute impact on women of a formula that systematically excludes them from desirable public service positions even

¹³ See 415 F. Supp. at 488, 491-92, 497-98.

¹⁴ See n. 10, *supra*.

though they have demonstrated their qualifications by passing a written exam.¹⁵

The Commonwealth argues that,

historical analysis makes it clear that the enactment of this legislation by the General Court was in no way motivated by a desire to discriminate against women. Rather, the legislative motivations for Massachusetts Veterans' Preference statutes were: (1) to reward those who have sacrificed in the service of their country; (2) to assist veterans in their readjustment to civilian life; and (3) to encourage patriotic service.

Brief for Defendants at 24, 25.

We disagree. It is clear that the Commonwealth's motive was to benefit its veterans. Equally clear, however, is that its intent was to achieve that purpose by subordinating employment opportunities of its women. The course of action chosen by the Commonwealth had the inevitable consequence of discriminating against the women of this state. See *Anthony v. Commonwealth, supra*, at 496. The fact that the Commonwealth had a salutary motive does not justify its intention to realize that end by disadvantaging its women.

Davis does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory

¹⁵ We recognize that "(m)ere absence of recruitment efforts, by itself is not equivalent to an intent to discriminate," *Guardians Assoc. of the New York City Police Dept. v. Civil Service Comm'n*, 431 F. Supp. 526, 535 (S.D. N.Y. 1977). We emphasize that our finding of discriminatory intent is not based solely on the Commonwealth's failure to show affirmative efforts to recruit women. This is merely one of the factors we rely on in considering the totality of the circumstances.

purposes. Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision solely by a single concern, or even that a particular purpose was the "dominant" or "primary" one.

Village of Arlington Heights v. Metropolitan Development Housing Corp., *supra*, at 265. (Footnotes omitted.)

The fact that there are less drastic alternatives available to the state to achieve its purpose of aiding veterans,¹⁶ underscores our conclusion that the absolute and permanent preference adopted by the Commonwealth resulted from improper evaluation of competing considerations. By intentionally sacrificing the career opportunities of its women in order to benefit veterans, the Commonwealth made a constitutionally impermissible value judgment.

We reaffirm our holding that the Massachusetts Veterans' Preference Act denies equal protection under the law and, therefore, is unconstitutional.

JOSEPH L. TAURO,
District Judge.

CAMPBELL, *Circuit Judge* (concurring). This is not an easy case to deal with under *Washington v. Davis*, 426 U.S. 229 (1977). On the other hand, there can be no question about the unequal impact of this law: practically speaking, it permanently shuts off whole areas of state employment to women. On the other hand, as Judge Murray points out in his dissent,

¹⁶ *Anthony v. Commonwealth*, 415 F. Supp. 485, 499 (D. Mass. 1976).

a strong initial case can be made for the proposition that it is "neutral on its face," and not motivated in any ordinary sense by a discriminatory intent.* Arguably, therefore, the challenged statute is the kind of law which, notwithstanding its widespread impact on women's employment opportunities, should be upheld as constitutional. The thrust of *Washington v. Davis* and related decisions such as *Village of Arlington Heights v. Metropolitan Housing Corporation*, 429 U.S. 252 (1977), is that we must accept that well-intentioned programs may have uneven side effects: society is too complicated for every discriminatory consequence to disqualify legitimate policies. Welfare programs, for example, foreseeably benefit minority groups disproportionately, just as tax deductions do whites. Examinations (as in *Washington v. Davis*) designed reasonably to weed out those unqualified for police work, may eliminate minority applicants more than others. Town and city planning laws, designed to improve community life, may because of separate economic factors, create barriers to minorities. Society would soon be in a state of paralysis if it could adopt only laws having strictly equal impact upon all groups and classes within it.

But while I fully recognize not only that *Washington v. Davis* is the law of the land but also that its principle reflects an essential limitation upon the sweep of the equal protection clause, I do not believe that the Massachusetts veterans prefer-

* The statute can be called facially neutral in that it does not make a division based strictly on sex. The law provides employment preference for veterans, not males. While veterans are 98% male, a few veterans are female, and there are many males who are not veterans.

The statute can likewise be said not to be based on a discriminatory intent, in the sense that no one thinks that it was enacted as a pretext to harm women. While the harm to female employment opportunities is extensive and, given the statutory scheme, inevitable, it was not this harm which prompted passage of the law, but rather the entirely justifiable desire to aid individuals who had served their country, often at great sacrifice.

ence law actually falls within its ambit. This, as Judge Tauro convincingly demonstrates, is no ordinary statute having merely an incidental unequal impact. It is a statute which goes a long way towards making upper level state employment a male preserve. Upon close inspection, the seeming "neutrality" of the veterans preference law, and even its seeming absence of intentional discrimination, are both open to serious question.

I turn first to the matter of its neutrality. While the dividing line between veterans and non-veterans is not the same as the dividing line between men and women, the ineluctable effect of this law is to confer an absolute priority upon a class that is 98% male in a sphere of employment where women, generally, should have the same access as men. What the law does, is to take a group which has, for unique reasons, been selected almost exclusively from the male population (military service being what it was and is), and grant it an absolute preference in an entirely different sphere of public employment where male preference is not only not the rule but is constitutionally impermissible. The law may be "facially neutral" in the limited sense that it is not based overtly on selection by sex, but since the preferred class is 98% male the effect is virtually the same as if it were.

The discriminatory impact in *Washington v. Davis* was far less inevitable: the selection device at issue, a police examination, did not mandate the recruitment of a class made up, overwhelmingly, of whites. While past experience might have indicated that proportionately fewer blacks than whites would pass the neutral examination, this was not an inevitable outcome: a black who was determined to succeed might by dint of extra effort make up for past disadvantages; coaching and recruiting measures, as well as educational and economic improvements, might, over the years, increase the number of successful blacks. No such opportunity exists here for women.

The veterans preference law prefers an already established class which, as a matter of historical fact, is 98% male. Because only persons who have served during wartime are eligible for the preference, the class cannot be expanded in the near future to include more women. Thus its "neutrality" is at best skin-deep. The law was sexually skewed from the outset, since the exclusionary effect upon women was not merely predictable but absolutely inescapable and "built-in".

This same inevitability of exclusionary impact upon women also undermines the argument of no discriminatory intent. There is a difference between goals and intent. Conceding, as we all must, that the goal here was to benefit the veteran, there is no reason to absolve the legislature from awareness that the means chosen to achieve this goal would freeze women out of all those state jobs actively sought by men. To be sure, the legislature did not wish to harm women. But the cutting-off of women's opportunities was an inevitable concomitant of the chosen scheme — as inevitable as the proposition that if tails is up, heads must be down. Where a law's consequences are *that* inevitable, can they meaningfully be described as unintended? Doubtless the impact on women, if considered at all, was regarded as an acceptable "cost" of aiding veterans. But may society properly elect to aid veterans or any other group at the cost of abolishing equal employment opportunities in a major segment of public employment? In my view, the answer is "no".

This is not to say that society may not bestow benefits upon veterans. But I think it may not construct a system of absolute preference which makes it virtually impossible for a women, no matter how talented, to obtain a state job that is also of interest to males. Such a system is fundamentally different from the conferring upon veterans of financial benefits to which all taxpayers contribute, or from the giving to them of some degree of preference in government employment, as

under a point system, as a *quid pro quo* for time lost in military service. The latter measures do not impose unfairly upon one segment of our society; the instant law, in contrast, forces women to pay a disproportionate share of the cost of benefiting veterans by sacrificing their own chance to be selected for state employment.

Thus while it is concededly a close question whether the Massachusetts veterans preference is to be regarded as the sort of neutral classification with unintended effects absolved by *Washington v. Davis*, I feel on balance that it is not. Rather the law is more realistically viewed as substantively non-neutral. The destruction of normal female opportunities in the state employment system is too evident a consequence of the super-imposition of veterans as an absolutely preferred class upon that system. If this can be done constitutionally, the equal protection clause of the Constitution is, in this area of employment, little more than a hollow pretense, whatever it may remain in theory. As I think the unique problem posed in this case is distinguishable from any contemplated in *Washington v. Davis*, I adhere to our former judgment.

LEVIN H. CAMPBELL,
U.S. Circuit Judge.

MURRAY, Senior District Judge (Dissenting). *Washington v. Davis*, 426 U.S. 229, 239, 242 (1977) holds:

. . . [O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact. [Emphasis in original.]

* * * * *

. . . [W]e have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another.

The majority today determines that *Washington v. Davis*, *supra*, supports their previous holding that the Massachusetts Veterans' Preference statute, Mass. Gen. Laws ch. 31, § 23, deprives women of equal protection of the laws in violation of the Fourteenth Amendment in all areas of civil service employment in the Commonwealth. Although recognizing that "[a] facially neutral statute may not be deemed vulnerable to equal protection challenge solely because it has a disproportionate impact", *ante* at 8, Judge Tauro reaches this determination by finding that "[w]e are dealing here with a statute that is not facially neutral", *ante* at 13, fn. 7, and that it is the Commonwealth's intent to achieve the purpose of benefiting its veterans "by subordinating employment opportunities of its women". *Ante* at 20. Judge Campbell concurs in the judgment of unconstitutionality, finding that the inevitability and degree of disproportionate effect make the statute non-neutral and that the inevitability of effect suggests discriminatory intent. With respect, I disagree that these findings and the result reached are demonstrably tenable.

I

The Veterans' Preference statute is not on its face gender-based. *Anthony v. Commonwealth of Massachusetts*, 415 F. Supp. 485, 501 (1976) (Campbell, C.J., concurring). Clearly the statutory "division between veterans and non-veterans is not drawn along sex lines and does not provide for dissimilar

treatment for similarly situated men and women. On its face the statute is neutral . . .". *Id.* at 503 (Murray, J., dissenting). Most persons favored by the statutory preference are males, although a substantial number of those not so favored are also males. Non-veteran women in larger numbers share with non-veteran men the disfavor of the statute, but a number of those aided by the statute indeed are women. The statute explicitly includes women in its requirement for service during time of war, but not combat duty. Mass. Gen. Laws ch. 4, § 7, cl. 43; ch. 31, § 21; 1958 Op. Atty. Gen., 25-26. Although in operation it favors males in greater proportion than females for the higher civil service positions,¹ the statutory classification has not been shown to be a mere pretext to accomplish the purpose of invidiously discriminating against women. See *Geduldig v. Aiello*, 417 U.S. 484 (1974); *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976). Moreover, it is not disputed that the statutory preference was not enacted for the purpose of disqualifying women from receiving civil service appointments. *Anthony v. Commonwealth of Massachusetts*, *supra* at 495.

The attempted distinction between the test in *Davis* and the statute here is totally unconvincing: one is no more neutral than the other. In each case the classification is facially neutral, and in operation the effects are uneven; the only difference is that the statute here has a weightier impact on the

¹ Unequal treatment of plaintiff's interest in the opportunity for public employment under a statute serving ends otherwise within the power of the state to pursue, violates no fundamental interest guaranteed to plaintiff by the federal constitution. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976). Since the statute here is neutral on its face, and since it is undisputed that the statute was not enacted to harm women, the statutory scheme to benefit veteran men and women in the area of public employment to the disadvantage of non-veteran men and non-veteran women does not offend the equal protection clause of the Fourteenth Amendment.

relevant group, and impact alone is not determinative, *Washington v. Davis*, *supra*, at 239.²

II

In *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 264-266 (1977), the Court said:

Our decision last Term in *Washington v. Davis*, 426 U.S. 229 (1976), made it clear that official action will not be held unconstitutional solely because it results in a racially disproportionate impact. "Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination." *Id.*, at 242. *Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause . . .* [Emphasis supplied.]

. . . [I]t is because legislators . . . are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality. But racial discrimination is not just another competing consideration. When there is a *proof that a discriminatory purpose has been a motivating factor in the decision*, this judicial deference is no longer justified. [Emphasis supplied.]

The record before the court, to the extent that it provides direct and circumstantial evidence of intent, does not show,

² Judge Campbell states this result is an "unescapable and 'built-in'" feature of the law, *ante* at _____. But in weighing his argument that the statute is for that reason, *inter alia*, impermissibly discriminatory against women, it cannot be overlooked that the unfavorable impact of the statute is shared alike by non-veteran women and a large number of non-veteran men.

the operation of the statute and its effect to be a clear pattern, unexplainable on grounds other than an intent to limit the employment opportunities of women. This is so, whether the relevant facts are viewed totally or separately. Conceding the factor of unequal impact and that it was foreseeable, a showing of unconstitutional action has not been made. Even in *Davis* the government officials there might well have foreseen that blacks would not do so well on the test as whites. See *Boston Chapter, N.A.A.C.P. v. Beecher*, 504 F.2d 1017, 1021 (1st Cir. 1974). Awareness on the part of the legislature that disproportionate impact is not enough.³ Awareness, like foreseeability, is not proof of discriminatory intent, and other evidence is required. The legislative history of the statute with its unequal impact on women is clearly explainable as having the purpose of preferring qualified veterans for consideration for civil service jobs.⁴

³ See the concurring opinion of Mr. Justice Stewart, joined by Mr. Justice Powell, in *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 180 (1977):

That the legislature was aware of race when it drew the district lines might also suggest a discriminatory purpose. Such awareness is not, however, the equivalent of discriminatory intent.

⁴ The effect of certain statutory enactments would appear to be protective of women. See St. 1895, c. 501, § 1 and St. 1896, c. 517, § 2. Each sets out details of the preference and concludes: "But nothing herein contained shall be construed to prevent the certification and employment of women." See Opinion of the Justices, 166 Mass. 589, 592-593 (1896). The legislature in 1971 revised the provision allowing single sex requisitions, with the result that the number of "women's" jobs protected from the preference was severely limited, but the purpose of the revision would appear to be the prevention of occupational sex discrimination: the statute allows single sex requisitions only after approval has been obtained from the Massachusetts Commission Against Discrimination. Mass. Gen. Laws ch. 31 § 2A(e). See also G. Blumberg, *De Facto and De Jure Sex Discrimination Under the Equal Protection Clause: A Reconsideration of the Veterans' Preference in Public Employment*, 26 Buff. L. Rev. 3, 38 (1976-77).

The preference statute is not vulnerable to the claim that discriminatory intent may be inferred because there is no relationship between the preference and job performance. In the first place, the contention of no such relationship is open to dispute, see *Feinerman v. Jones*, 356 F. Supp. 252, 260 (M.D. Pa. 1973), but even if that contention were to prevail, it would bear on intent only if job performance were the *only* goal the legislature could serve by means of the preference. That is obviously not the case here, for it is in the national interest that enlistment in the armed service be encouraged, see e.g., H. Rpt. No. 93-857, 93rd Cong., 2d Sess. (1974) (Armed Forces Enlisted Personnel-Bonus Revision Act of 1974), and hiring preferences are well-established means for furthering that purpose. See, e.g., *Anthony v. Commonwealth*, *supra* at 496, 497; 42 U.S.C. § 2000e-11.

The statistical evidence presented by plaintiff provides no support for an inference of a discriminatory purpose. This is an impact argument, and *Arlington Heights* (and *Davis*) requires proof of intent as "a motivating factor". Plaintiff's systematic exclusion argument analogizes the jury-selection cases, but those cases do not apply in the context of this case. *Arlington Heights* pointed out that "[b]ecause of the nature of the jury-selection task, however, we have permitted a finding of constitutional violation even when the statistical pattern does not approach the extremes of *Yick Wo* [v. Hopkins, 118 U.S. 356 (1886)] or *Gomillion* [v. Lightfoot, 364 U.S. 339 (1960)] . . .". 429 U.S. at 266, n.13.⁵ Whatever the exact

⁵ The Court may be referring to the difference between an inference of intent from the cumulative impact of a series of administrative determinations and an inference from the impact of a rule promulgated by prior legislative or administrative action, see *Shield Club v. City of Cleveland*, 14 E.P.D. ¶ 7763 (N.D. Oh. 1976); it may be referring to the presumption, more likely in jury cases than in other cases, that the result of selection will be random, see J. Ely, *Legislative and Administrative Motivation in Constitution Law*, 79 Yale L.J. 1205, 1263-66.

focus of the Court in jury-selection cases, the Court makes it clear that even in those cases impact alone is determinative only when it emerges as "a clear pattern, unexplainable on grounds other than race", *Arlington Heights*, *supra* at 266. The facts here do not fit into that mold: it is undisputed that the preference here is based on a determination to help veteran men and women and not non-veterans.

Plaintiff's reliance on *Castaneda v. Partida*, 430 U.S. 482 (1977), which Judge Tauro finds no need to address, *ante* at 16, n.11, is distinguishable from the case before us. In that case statistics were used to show that the number of Mexican-Americans on certain grand juries normally to be expected, had the jurors been chosen randomly, was so much higher than the actual number of Mexican-Americans called that plaintiff had made out a *prima facie* case of equal protection violation. The statistics were presented in the context of the operation of the "key man" system of jury selection which allows jury commissioners to select jurors from a list on which Spanish surnames are easily identifiable, and the system is thus "susceptible of abuse". 430 U.S. at 497, 484-85, 495. No evidence was presented by the State, and the Court recognized that there would be no constitutional violation were the State to explain the numerical discrepancy on neutral grounds. As pointed out above, the preference statute is clearly explainable as having the purpose of preferring veteran men and women at the expense of non-veteran men and women.

III

The principle applied in tort and criminal actions, that an actor is presumed to intend the natural and foreseeable consequences of his deeds, must yield to the entirely different considerations at work when a federal court is addressing an equal protection challenge to state legislation. Principles of

federalism involve a "recognition of the value of state experimentation with a variety of means for solving social and economic problems", *Anthony*, *supra* at 502 (Murray, J., dissenting), and considerations of federalism require that an impermissible motive in enacting state legislation be not lightly inferred. See Note, Developments in the Law: Equal Protection, 82 Harv. L. Rev. 1065, 1093-94, n.101; A. Bickel, *The Least Dangerous Branch*, 214; P. Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motivation*, 1971 Sup. Ct. Rev. 95, 129-30. Inevitability of effect, even coupled with disproportionate impact, "absent a pattern as stark as that in *Gomillion* or *Yick Wo*" is not evidence of discriminatory purpose or intent.⁶ See *Davis*, *supra* at 242; *Arlington Heights*, *supra* at 266. A legislature's choice of preferring veterans implies invidious intent only if it appears inconsistent with expected and valid considerations.⁷

⁶The heart of Judge Campbell's argument is the following:

To be sure, the legislature did not wish to harm women. But the cutting-off of women's opportunities was an inevitable concomitant of the chosen scheme — as inevitable as the proposition that if tails is up, heads must be down. Where a law's consequences are *that* inevitable, can they meaningfully be described as unintended?

Ante at _____. The answer to his question must be that inevitability of effect is relevant only where it bears on intent, and to find intent as that word is used in *Washington v. Davis* one must find motive. Judge Campbell concedes that "[w]hile the harm to female employment opportunities is extensive and, given the statutory scheme, inevitable, it was not this harm which prompted passage of the law . . .". *Ante* at ____, n.*. Where, as here, a law's consequences were inevitable, but there is no evidence at all that those particular consequences motivated the legislature, they can indeed be described as unintended.

⁷See P. Brest, *supra*, 1971 Sup. Ct. Rev. at 121-122; Note, *Reading the Mind of the School Board: Segregative Intent and the De Facto/De Jure Distinction*, 86 Yale L.J. 317, 332-43 (1976).

In most hiring situations the difference in the scores of those certified would likely be very little different were the veterans' preference not in effect.⁸ There is here no indication that the legislature departed from usual considerations in enacting the preference. To the extent, however, that the legislature wishes to use civil service hiring practices to favor veterans, any effort to diminish the impact on women by diluting the preference necessarily results in a diminution of the benefit to veterans. Because of this nature of the hiring benefit, use of the "absolute" preference instead of a point preference, like the use of any preference at all, provides no ground for indictment of the legislature's motive.

IV

Since *Washington v. Davis*, three veterans' preference provisions have been subjected to equal protection challenge; all

⁸ For one of the positions applied for by plaintiff, that of Solomon Head Administrative Assistant, the three applicants certified, of whom one would be chosen, had scores of 77.40, 93.28, and 90.20. Without the veterans' preference, the top three scores would have been 94.88, 93.28, and 92.32 (plaintiff). Agreed Statement of Facts (hereinafter "Statement") ¶¶ 12, 13, Exhibits, 2, 4. For another position, that of Administrative Assistant, there were seven positions available. Eleven persons would be certified, Statement ¶ 9, and were the top eleven all to indicate interest, the positions would be filled from a group with scores of 88, 86, 86, 84, 94, 92, 92, 92, 90, 90, and 90. Without the preference, the selections would be from a group with scores of 94, 92, 92, 92, 91, 90, 90, 90, 90, 89, and 89. Statement ¶¶ 16, 17, Exhibit 7. For a third position, Assistant Secretary, Board of Dental Examiners, the top three scores were 89.72, 78.08, and 83.64; without the preference, the top three scores would have been 89.72, 86.68 (plaintiff), and 83.98. Statement ¶ 27, Exhibit 61. That the appointee for this position had a score of 78.08, the lowest of the three certified, indicates that there are other important qualifications besides test scores and thus that there is little reason to believe that the quality of the employee pool is significantly lowered by its containing persons with slightly lower test scores than would be present absent the veterans' preference statute.

three have been upheld. *Bannerman v. Dept. of Youth Authority*, 436 F. Supp. 1273 (N.D. Cal. 1977); *Branch v. DuBois*, 418 F. Supp. 1128 (N.D. Ill. 1976); *Ballou v. State, Dept. of Civil Service*, 372 A.2d 333 (N.J. App. Div. 1977), *aff'd*, 46 U.S.L.W. 2454 (N.J. 1978). Three of the decisions distinguish *Anthony v. Commonwealth*, *supra*, as having been based on a stronger negative effect on women than those courts faced. The California court, however, states that the approach used in *Anthony* was "rejected in *Washington v. Davis*", *Bannerman*, 436 F. Supp. at 1280. Each court had little trouble in concluding that no intent to harm women was present, even in the "absolute" preference at issue in New Jersey. The Illinois court's language is representative.

While those who never served in the armed forces, those who served at times not within the statutory periods and women who are not veterans suffer a disadvantage in hiring and promotion, this is an incidental result of a statute intended to reward veterans and not one intended to discriminate against men and women who are not veterans or those whose service was in times of limited military action.

Branch v. DuBois, 418 F. Supp. at 1133.⁹

⁹ This court would seem to have agreed in its earlier opinion, where the majority stated that

[t]he Massachusetts Veterans' Preference was not enacted for the purpose of disqualifying women from receiving civil service appointments.

Anthony v. Commonwealth of Massachusetts, 415 F. Supp. 485, 495 (1976). Nowhere in his opinion has Judge Tauro said that the Massachusetts legislature intended to harm job opportunities for women or that limiting

The impact of the statute at issue here does not approach the extremes described in *Arlington Heights, supra* at 266, and plaintiff must prove intent by other evidence. This she has not done. The question: Would the veterans' preference statute have been enacted if women were represented in the armed services in such numbers that the preference would have no discriminatory effect? has not been addressed by plaintiff, and she has given the court absolutely no reason to answer this question in the negative. She has failed to make out a prima facie case of discriminatory intent. See *Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S. 274, 287 (1977). In light of *Washington v. Davis* I would not hold, as the majority does, that the Massachusetts Veterans' Preference statute violates the Equal Protection Clause of the Fourteenth Amendment. I dissent.

FRANK J. MURRAY,
Senior District Judge.

such opportunities was a motive in enactment of the legislation, and that, of course, is precisely what must be shown. All Judge Tauro will say is that the legislature's "clear intent was to benefit veterans even at the expense of women", *ante* at 7. This says nothing about motive and is entirely consistent with a finding that the legislature saw the impact on women as extremely regrettable but unavoidable.

Appendix B.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS.

HELEN B. FEENEY,
PLAINTIFF,

v .

THE COMMONWEALTH OF
MASSACHUSETTS, ET AL.,
DEFENDANTS,

CIVIL ACTION
No. 75-1991-T

Notice of Appeal to the Supreme Court
of the United States.

Notice is hereby given that the Defendants, acting by and through their attorneys and pursuant to Supreme Court Rule 10, hereby appeal the judgment of this Court to the Supreme Court of the United States. In accordance with the provisions of Supreme Court Rule 10(2), the Defendants specify:

1. The parties taking the appeal are the Personnel Administrator of the Commonwealth (referred to as the Massachusetts Director of Civil Service in the pleadings) and the members of the Massachusetts Civil Service Commission, who are collectively referred to herein as the Defendants;

2. Defendants appeal from paragraph 2 of the Judgment and Order of the Court entered on May 3, 1978, and from subparagraph (a) of the order enjoining Defendants from utilizing Mass. Gen. Laws c. 31, § 23 (1971) (The Massachusetts Veterans' Preference Act) in any future selection of persons to fill civil service positions with the Commonwealth; and

3. Direct appeal to the Supreme Court of the United States is authorized by 28 U.S.C. 1253.

Respectfully submitted,
 By Their Attorneys,
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DATED: June 13, 1978.

[Certificate of Service omitted in printing.]

Appendix C.

MASSACHUSETTS ACTS OF 1976.

Chap. 200. AN ACT SUSPENDING THE OPERATION OF THE VETERANS PREFERENCE LAW SO-CALLED, PENDING A DECISION OF THE UNITED STATES SUPREME COURT AND PROVIDING FOR THE ESTABLISHMENT OF A POINT SYSTEM OF PREFERENCE DURING SUCH SUSPENSION.

Whereas, The deferred operation of this act would tend to defeat its purpose, which is, in part, to maintain the system of veterans preference and to facilitate the system of public service in the commonwealth, therefore, it is hereby declared to be an emergency law, necessary for the immediate preservation of the public safety and convenience.

Be it enacted, etc., as follows:

SECTION 1. Section 23 of chapter 31 of the General Laws is hereby suspended until final judgment has been entered in the case of *Helen B. Feeney v. Commonwealth* which was brought in the United States District Court.

SECTION 2. Until the expiration of the period of suspension provided in section one, the grade received in a civil service examination by a disabled veteran or by the widow or widowed mother of a veteran who was killed in action or who died from service connected disability incurred in wartime service shall be increased by ten points and the grade of other veterans as defined in section twenty-one of said chapter thirty-one shall be increased by five points. In any such examination in which experience is a factor in determining an applicant's grade or eligibility a veteran shall be given credit for service in the armed forces when his employment in a similar vocation to

that for which he was examined was interrupted by service, and for all experience material to the position for which he was examined, including experience gained in religious, civic, welfare, service and organizational activities, regardless of whether he received pay therefor.

The names of applicants who have qualified in a competitive civil service examination shall be entered on their appropriate registers or list of eligibles in the following order:

For positions in job Group XVII or higher in the salary and classification plan of the commonwealth or positions in the service of a city or town for which an equivalent salary has been established, in order of their rating, including points added under this section, and

For all other positions:

(A) disabled veterans who have a compensable service-connected disability of ten per cent or more, in the order of their ratings, including points added under this section; and

(B) remaining applicants, in the order of their ratings, including points added under this section.

The names of persons entitled to additional credit under this section shall be entered ahead of others having the same rating. A disabled veteran shall be retained in employment in preference to all other persons, including veterans.

SECTION 3. The provisions of this act shall apply to all eligible lists established as a result of an examination held prior to or after its effective date. Persons appointed from lists established under the provisions of this act during the period of suspension of section twenty-three of chapter thirty-one, as provided in section one of this act, shall for all purposes be deemed to have been properly appointed under said chapter thirty-one, notwithstanding a decision in said case of *Helen B. Feeney v. Commonwealth* which may hold that the provisions of said section twenty-three are constitutional.

Approved June 24, 1976.

NOV 24 1978

MICHAEL BODAK, JR., CLERK

APPENDIX.

**In the
Supreme Court of the United States.**

OCTOBER TERM, 1978.

No. 78-233.

**PERSONNEL ADMINISTRATOR OF THE
COMMONWEALTH OF MASSACHUSETTS ET AL.,
APPELLANTS,**

v.

**HELEN B. FEENEY,
APPELLEE.**

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS.**

**Appeal Docketed August 10, 1978.
Jurisdiction Noted October 10, 1978.**

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United States District Court for the District of Massachusetts.

No. 74-5061-T

CAROL A. ANTHONY

v.

COMMONWEALTH OF MASSACHUSETTS;
DIVISION OF CIVIL SERVICE OF THE
COMMONWEALTH OF MASSACHUSETTS;
EDWARD W. POWERS; NANCY B. BEECHER;
WAYNE A. BUDD; JOSEPH M. DUFFY;
RICHARD J. HEALEY; AND HELEN C. MITCHELL.

Docket Entries.

1974

November

4 TAURO, D.J. Complaint and application for
three-judge court, filed;
Affidavit of Plaintiff in support of TRO, filed;
Memo in support of TRO and three-judge
court, filed;

1974

November

- 4 Arguments; motion for TRO, allowed and issued at 3 P.M.
- 11 C.H.J., COFFIN, ORDER ENTERED: Designating D.J. CAMPBELL, D.J. MURRAY and D.J. TAURO as members of three judge panel copy to all counsel.
- 15 Deft., Albert E. Salt, Esq. Motion to intervene by aggrieved party, filed with affidavit of service.
- 25 Dfts' motion to dismiss, filed c/s.
Dft's motion to extend time to file memo in support of motion to dismiss, filed c/s.
- 22 Pltff's opposition to Salt's motion to intervene, filed c/s.

December

- 4 Pltf's opposition to defts' motion to dismiss, filed, c/s
- 4 Pltf's motion to extend time for filing of memorandum in opposition to deft's motion to dismiss, filed, c/s.
- 19 Motion by Aggrieved Party to Call Judicial Attention to the Fact that the Restraining Order Issued by the Court, as Presently Enforced, is in Violation of the Fourteenth Amendment. Filed. c/s.
- 26 Notice of conference for Feb. 11, 1975 at 10 A.M. to Messrs. Dignan, Reinstein, Mayo, Salt and Daly.

1975

February

- 11 TAURO, D.J.
Conference; agreed statement of facts and memoranda of law to be filed by April 1, 1975, reply briefs to be filed by April 8, 1975; Hearing on motion to dismiss and on the merits to be scheduled after reply briefs are filed; copy of House Bill #1777 submitted to the Court; hearing on motion to intervene; arguments; advisement.
- 11 TAURO, D.J. Motion to intervene denied. Mr. Salt, however, may file brief amicus curea; notice to all counsel.
- 13 Notice of hearing on the merits for April 14, 1975 at 10 A.M. to all counsel.
- 18 Motion to intervene as defts., by the Disabled Veterans of The United States, Department of Massachusetts and the Jewish War Veterans of the United States, Department of Massachusetts, filed. Copies to 3 Judge Panel.
- 18 Intervenors' motion to dismiss, filed, c/s. Copies to members of the Three Judge Panel.

March

- 3 Pltff's opposition to the motion to intervene of disabled veterans of the United States Dept. of Mass. and the Jewish War Veterans of the United States, Dept., of Mass. filed, c/s. Copies to Three Judge Panel.

1975

March

TAURO, D.J.

25 Motion to continue briefing and argument, filed, copies to Three Judge Panel; motion allowed, hearing continued; copy to members of panel.

31 The D.A.V. and the J.W.V., departments of Mass. oppose and protest the motions to continue briefing and argument, filed, c/s. Copies to members of the panel.

April

23 Motion for hearing on Intervenors pleadings, filed, c/s. Copies to Three Judge Panel.

May

5 Letter dated May 2, 1975 to Judge Tauro from Mr. Ward, representing plaintiff, requesting conference; conference scheduled for 5-22-75 at 3 P.M., Mr. Ward to notify other counsel, including Mr. Salt, intervenor.

19 Pltff's motion to add Betty A. Gittes and Kathryn Noonan as Pltffs. filed, c/s (Copies to Three-judge panel.)

21 Pltfs' motion to consolidate for trial this action with *Feeney v. Commonwealth of Mass., ET AL*, CA 75-1991-T, filed with cs. Copies to 3-Judge panel.

22 TAURO, D.J. Case called for conference; to consolidate 75-1991-T with 74-5061-T, allowed; All discovery to be completed within four weeks, agreed statement of facts to be filed two weeks after completion of all discovery and briefs and memoranda to be filed four weeks after agreed statement of facts are

1975

May

22 are filed; pre-trial order to issue for hearing in September. Motion to intervene, denied but intervenor allowed to file his brief. Motion to amend complaint by adding party plaintiffs, allowed.

23 TAURO, D.J. May 23, 1975 Procedural order issued. Copies to counsel.

TAURO, D.J.

28 Pre-Trial order issued for hearing on Sept. 5, 1975 at 11 A.M. to all counsel.

June

5 Deft's motion to dismiss, (Copies to Three Judge Panel) filed, c/s.

16 Pltff's opposition to deft's motion to dismiss, filed, c/s. copies to Three Judge Panel.

July

1 Motion of the parties to have to July 17, 1975 to file agreed statement to facts, filed.

2 TAURO, D.J., Motion of parties for modification of Order establishing date (July 17, 1975) for filing agreed statement of facts, "ALLOWED." Copies to Three Judge Panel.

17 Agreed Statement of Facts, filed. Copies to Three-Judge Panel

17 Exhibits 1-50; 51-86; 61; 93; 113-168, filed.

17 Exhibits 90-112 and 91 filed.

21 Motion of parties for modification of Order for the filing of Briefs and for permission to file reply Briefs, filed. Copies to Three Judge Panel.

1975

July

23

TAURO, D.J., Motion of parties for modification of order for the filing of briefs and for permission to file reply briefs, "ALLOWED." Copies to counsel.

August

4

Motion of Parties for modification of order for the filing of Briefs and for the filing of reply Briefs, filed.

6

TAURO, D.J., in re motion of parties for modification of order for the filing of briefs and for the filing of reply briefs; motion is ALLOWED. Copies to Messers Ward, Reinstein, Posner and Salt.

8

Motion of parties for modification of order for the filing of Briefs and the filing of reply briefs, filed.

8

Brief for the defendant FILED cs.

8

TAURO, D.J., Motion of parties for modification of order for the filing of briefs and for the filing of reply briefs, "Allowed." Copies to counsel.

13

Brief of the plaintiffs, filed Copies to the Three Judge Panel.

14

TAURO, D.J., Pltffs' motion to extend time to file briefs to Aug. 20, 1975, filed and allowed; counsel notified.

15

Letter to Judge Tauro, dated Aug. 14, 1975, from Stephen B. Perlman, Esq. re submitting corrections in the agreed statements of facts, filed. copies to be filed Monday 18, 1975 for a 3 Judge Panel

15

Reply Brief for the defts., filed, c/s. Copies to 3 Judge Panel.

1975

August

18

Letter to Judge Tauro, dated Aug. 15, 1975, from A.A.G. Posner and Stephen B. Perlman, Esq. Re After discussion, counsel are in agreement that items one through six have been addressed in the briefs and agreed statements of fact already submitted by the parties, Further, counsel agree that the remaining items (seven through eleven) are not applicable because the above-entitled cases do not involve witnesses or presentation of other evidence. Counsel therefore request that the Court consider the documents already filed by the parties as meeting the requirements of a pre-trial memorandum, filed.

20

Reply brief of the Plaintiffs, filed; copy to members of the Three-Judge panel.

28

Letter to Clerk Doherty, dated Aug. 25, 1975, from Eleanor D. Acheson, Re Requesting a notification from your office should Judge Tauro deny the request and desire a pre-trial memorandum for the September 5, 1975 per-trial conference, filed.

September

5

Four copies of errata respecting the Brief of the pltffs and the reply Brief of the pltffs., filed. Copies to Three-Judge Panel.

5

Letter to Judge Tauro, dated Sep. 5, 1975, from Stephen B. Perlman Re Four additional copies each of the Brief of the Pltffs and the Reply Brief of the pltffs. The copies are identical in all respects to those filed on Aug. 13, 1975, and Aug. 20, 1975, respectively, except that (1) the copies have been

1975

September

- 5 corrected to reflect the errata furnished to the Court by letter dated Sep. 4, 1975, and (2) the enclosed copies of the Brief of the plttfs., have been photocopied on both sides of each page, filed. Copies to Three-Judge Panel.
- 5 Pltff's Reply Brief, filed, c/s. Corrected
- 5 Pltff's Brief corrected, filed, c/s.
- 5 TAURO, D.J., Pre-Trial Conference; Date to be Set for Hearing on Merits in October by Three-Judge Panel.
- 9 Notice of trial on merits for Oct. 22, 1975 at 2:15 P.M. to members of three judge panel and all counsel.

October

- 15 TAURO, D.J., ORDER: CA 74-5061-T and CA 75-1991-T Take notice that the above-entitled hearing on October 22, 1975 at 2:15 PM before CAMPBELL C.J., MURRAY, D.J. have been rescheduled for hearing on Wednesday, November 19, 1975 at 2:15 PM in Courtroom No. 2 12th Floor, U.S. Post Office & Courthouse, Boston, Mass., ENTERED. Copies to counsel and Three Judge Panel.

November

- 13 Notice sent, via certified mail, to Gov. Dukakis and Atty. General Bellotti in re Three-Judge Panel hearing on Wed., November 19, 1975 at 2:15 PM, pursuant to the provisions of 18 U.S.C. § 2284 (2).

1975

November

- 19 TAURO, D.J. Case called for hearing on merits; Atty. Ward to argue for all the plttfs; Atty. Posner to argue for all the defts; Argument; Court adjourns for deliberation at 3:13 PM.

1976

March

- 29 CAMPBELL, C.J., MURRAY, D.J., TAURO, D.J. Opinions (3) issued.
- CAMPBELL, C.J., TAURO, D.J. Judgment and order entered. cc/cl and West, Lawyer's Weekly, NCAIR, U.S. Law Week and Opinion Book.

**United States District Court
for the District of Massachusetts.**

No. 75-1991-T.

HELEN B. FEENEY

v.

COMMONWEALTH OF MASSACHUSETTS;
DIVISION OF CIVIL SERVICE OF THE
COMMONWEALTH OF MASSACHUSETTS;
EDWARD W. POWERS; NANCY B. BEECHER;
WAYNE A. BUDD; JOSEPH M. DUFFY;
RICHARD J. HEALEY; AND HELEN C. MITCHELL.

Docket Entries.

1975

May

- 20 Complaint filed.
- 22 TAURO, D.J. Case called for conference; motion filed in 75-5061-T to consolidate with this action allowed; all discovery to be completed within four weeks, agreed statement of facts to be filed two weeks thereafter and briefs and memoranda to be filed four weeks after that; pre-trial order to issue for hearing in September.
- 23 TAURO, D.J. May 23, 1975 Procedural order issued. Copies to counsel.
- 23 TAURO, D.J. Temporary Restraining Order issued. Copies to counsel.

1975

May

- 28 TAURO, D.J. Pre-trial order issued for hearing on Sept. 5, 1975 at 11 A.M.; copy to all counsel.

June

- 5 Defts' motion to dismiss, filed, c/s.
- 10 FRANK M. COFFIN, CH.J. U.S. COURT OF APPEALS ORDER ENTERED: May 6, 1975 Designating C.J. CAMPBELL, D.J. FRANK J. MURRAY, AND D.J. TAURO as members of three judge panel. Copy to all counsel.
- 12 TAURO, D.J. Motion of parties for modification of order establishing date for filing agreed statement of facts, "Allowed." Copies to Three Judge Panel.
- 16 Plaintiffs' opposition to defendants' motion to dismiss, filed, c/s. Copies to Three Judge Panel.
- 27 Motion to intervene as a deft., or for leave to file a Brief as Amicus Curiae, filed, c/s. Copies to Three Judge Panel.
- 27 Affidavit of John P. Swift in support of motion to intervene as a deft., or for leave to file a Brief as Amicus Curiae Brought by the American Legion, Department of Massachusetts, Inc., filed, c/s. Three Judge Panel copies sent to them.
- 27 Affidavit of Joseph F. Irvin, filed, c.s. Copies to Three-Judge Panel.

1975

June

- 27 Brief in support of motion to intervene as a deft., or for leave to file a brief as Amicus Curiae made by the American Legion, Department of Massachusetts, Inc., filed, c/s. Copies to Three Judge Panel.

July

- 1 Motion of the parties to have to July 17, 1975 to file agreed statement of facts, filed.
- 2 TAURO, D.J. Motion of parties for modification of Order establishing date (July 17, 1975) for filing agreed statement of facts, "ALLOWED." Copies to Three Judge Panel.
- 7 Plaintiff's Opposition to the Motion to Intervene of the American Legion, Dept. of Mass., Inc., filed c/s. Copies to Three Judge Panel Memorandum in opposition to the Motion of the American Legion to Intervene as a Deft filed, copies to Three Judge Panel.

June

- 27 TAURO, D.J. Motion to Intervene as a Deft. or for leave to file a Brief as Amicus Curiae "Motion to file Amicus brief ALLOWED, Motion otherwise DENIED. Copies to Messrs. Ward, Reinstein, Posner and Curtin.

July

- 17 Agreed Statement of Facts, filed. Copies to Three-Judge Panel.
- 17 Exhibits 1-50, filed.
- 17 Exhibits 51 through 84, filed.

1975

July

- 17 Exhibits 61, filed.
- 17 Exhibits 90 through 112, filed.
- 17 Exhibits 91 filed.
- 17 Exhibits 93 filed.
- 17 Exhibits 113 through 168, filed.
- 22 Motion of parties for modification of Order for the filing of Briefs and for permission to file reply briefs, filed. Copies to Three Judge Panel.
- 23 TAURO, D.J. Motion of parties for modification of order for the filing of briefs and for permission to file reply briefs, "ALLOWED." Copies to counsel.

August

- 4 Motion of Parties for modification of Order for the filing of Briefs and for the filing of reply Briefs, filed.
- 6 TAURO, D.J. In re motion of the parties for modification of the order for the filing of briefs and for the filing of reply briefs, motion is ALLOWED. Copies to Messrs. Ward, Reinstein, Posner and Curtin.
- 8 Motion of Parties for modification of order for the filing of Briefs and for the filing of reply Briefs, filed.
- 8 Brief for the defendant FILED cs.
- 8 TAURO, D.J. Motion of parties for modification of order for the filing of briefs and for the filing of reply briefs, "ALLOWED." Copies to Three Judge Panel.

1975

August

- 11 Amicus Curiae brief of the American Legion Department of Mass. Inc., in support of the constitutionality of the Massachusetts Veterans' Preference Statute FILED with cs.
- 13 Brief of the plaintiffs, filed. Copies to the Three Judge Panel.
- 14 TAURO, D.J. Pltffs' motion extending time to Aug. 20, 1975 to file reply briefs, filed and allowed; counsel notified.
- 15 Reply brief for the defts, filed, c/s.
- 20 Reply brief of the plaintiffs, filed; copy to members of the Three-Judge Panel.

September

- 5 Four copies of errata respecting the brief of the pltffs., and the reply brief of the pltffs., filed; copy to members of the Three-Judge Panel.
- 5 Letter to Judge Tauro, dated Sep. 5, 1975, from Stephen B. Perlman Re Four additional copies each of the brief of the pltffs., and the Reply Brief of the pltffs. The copies are identical in all respects to those filed on Aug. 13, 1975, and Aug. 20, 1975, respectfully, except that (1) the copies have been corrected to reflect the errata furnished to the Court by letter dated Sep. 4, 1975, and (2) the copies of the Brief of the pltffs., have been photocopied on both sides of each page, filed, Copies to Three-Judge Panel.
- 5 Pltffs' Reply Brief, filed, c/s. (corrected)

1975

September

- 5 Pltffs' Brief corrected, filed, c/s.
- 5 TAURO, D.J. Pre-Trial Conference; Date to be Set for Hearing on Merits in October by Three-Judge Panel.
- 9 Notice of hearing on the merits for Oct. 22, 1975 at 2:15 P.M. to members of three judge court panel and all counsel.

October

- 15 TAURO, D.J. (CA 74-5061-T AND CA 75-1991-T) ORDER ENTERED: Take notice that the above-entitled hearing on October 22, 1975 at 2:15 PM before CAMPBELL, C.J., MURRAY, D.J. AND TAURO, D.J. have been rescheduled for hearing on Wednesday, November 19, 1975 at 2:15 PM in Courtroom No. 2, 12th Floor, U.S. Post Office & Courthouse, Boston Mass. Copy to counsel and members of Panel.
- 19 TAURO, D.J. Case called for hearing on merits; Atty. Ward to argue for all the pltffs; Asty Posner to argue for all the defts; Argument; Court adjourns for deliberation at 3:13 PM.

1976

March

- 29 CAMPBELL, C.J., MURRAY, D.J., TAURO, D.J. Opinions (3) filed.
- CAMPBELL, C.J., TAURO, D.J. Judgment and order entered. cc/cl and West, Lawyer's Weekly, NCAIR, U.S. Law Week and Opinion Book.

1976

April

- 5 Copy of letter to Representative Hogan from Mr. Irvin filed with attachments.
- 6 Copy of letter to Editor, Herald American from Mr. Irvin filed.

May

- 25 Defts' notice of appeal filed, c/s.
Motion for relief from judgment filed, c/s.
Motion for stay of judgment and order pursuant to Supreme Court Rule 18 filed, c/s.
Memorandum of points and authorities in support of motion for relief from judgment and stay of judgment and order pursuant to Supreme Court Rule 18 filed, c/s.
Motion to file a late affidavit filed, c/s. Copies of above to 3 Judge Court.
Letter to the Clerk from Mr. Bellotti filed.

June

- 1 Motion for continuance . . . filed, assented to. Copies to 3-Judge Court.
- 3 TAURO, D.J. Above motion allowed.
- 4 Affidavit of WALLACE H. KOUNTZE, filed and copies to members of three-judge panel.
- 10 Counsel notified of hearing on 6-23-76 at 2:15 PM.
- 14 Pltffs' opposition to Dfts' motion for stay of judgment; opposition to Dfts' motion for relief from judgment and motion for leave to extend time for pltff to file a consolidated memo and additional affidavits, filed c/s, copy to members of three-judge panel.
- 16 Supplemental motion for relief from judgment filed, c/s. Copies to three-judge panel.

1976

June

- 16 TAURO, D.J. Order entered: "All memoranda and related materials dealing with the matters to be taken up at the hearing scheduled for Wednesday, June 23, 1976 must be filed by the close of business, Monday, June 21, 1976." Copy to counsel and members of the three-judge panel.
- 21 Deft's memo in support of supplemental motion for relief from judgment filed, c/s.
- 22 Stipulation filed.
Memo in opposition to defts' motions for relief from judgment under Rule 60(b) and motion for stay of judgment and order pursuant to Supreme Court Rule 18 filed, c/s.
- 23 Affidavit of Francis X. Bellotti filed, c/s.
- 23 CAMPBELL, C.J., MURRAY, D.J. AND TAURO, D.J. Hearing on various motions; arguments; motion for reconsideration and to modify injunction, denied; motion for stay pending appeal, granted; order to enter.
- 25 Letter to the Clerk from Mr. Reinstein with attached copies of legislation filed, cc/Three Judge Court.
- 28 TAURO, D.J. Order entered, denying motion for relief from judgment, denying motion for relief (supplemental) from judgment, and taking no action on motion for stay. cc/cl.
- August
- 2 Judgment and Order, Notice of Appeal forwarded to the Supreme Court of the United States.

1976

November

- 10 Letter from Helen Taylor of the Supreme Court w/ attached opinion, filed.

1977

October

- 19 01 CAMPBELL, C.J., TAURO, D.J., MURRAY, S.D.J. Order for filing briefs and for Oral argument on 11/29/77 at 2:15 PM entered. cc/Three Judge Court and counsel.

November

- 7 02 P's motion, assented to, for modification of order establishing briefing schedule and to continue hearing, filed; copies to members of Three-Judge Court Panel.
- 9 TAURO, D.J. Motion, No. 2, allowed; hearing continued to Wed. Dec. 14, 1977 at 2:15 PM, copy to counsel and members of three-judge court panel.
- 10 03 Certified copy of judgment from Supreme Court filed.
- 28 04 Defts' brief filed, c/s. Copies to three judge Court.
- 05 Pltf's supplementary memo filed, c/s.
- 06 Pltf's motion for leave to amend and supplement complaint filed, c/s.
- 07 Memo in support of 06 filed, c/s.
- Copies of 05, 06 and 07 to three judge Court.
- 30 08 Amicus brief of American Legion filed, c/s. Copies to three judge Court.
- 09 Ds' opposition to P's motion for leave to amend and supplement complaint, filed c/s.
- 10 Memo in support of No. 09, filed c/s.

1977

November

- 30 Copies of Nos. 09 and 10 to members of the panel.

December

- 5 11 Reply brief of defts' filed, c/s. Copies to 3 judge Court.
- 12 Pltf's reply memo filed, c/s. Copies to 3 judge Court.
- 6 13 CAMPBELL, C.J., TAURO, D.J., MURRAY, S.D.J. Order entered setting argument on pltf's motion to amend for 12/14/77 at 2:15 PM, and for filing memoranda by 12/13/77 at 4:00 PM cc/cl and three judge Court. Telephone notice to Messrs. Ward, Kiley and Adkins.
- 8 14 Pltf's motion for clarification filed, c/s. Copies to 3 judge Court.
- 9 15 CAMPBELL, MURRAY AND TAURO, ORDER ENTERED: "In response to plaintiff Feeney's 'Motion for clarification' the parties are advised to brief any substantive issues to be considered by the court together with the procedural issues in determining whether the motion is to be allowed."; copy to counsel and three judge court panel.
- 13 16 Supplemental memo in support of plaintiff's motion for leave to amend and supplement the complaint. c/s.
- 17 Memo. of defts. in opposition to pltf.'s motion for leave to amend and supplement the complaint.

1977

December

- 14 CAMPBELL, C.J., TAURO, D.J., MURRAY, S.D.J. (M), CURRY, REPORTER, THREE JUDGE COURT HEARING; ARGUMENTS; ON 1) MOTION BY PLTF TO AMEND PLEADINGS; 2) REMAND BY U.S. SUPREME COURT IN LIGHT OF CASE OF WASHINGTON V. DAVIS, ADVISEMENT.

1978

MAY

- 3 18 CAMPBELL, C.J., TAURO, D.J., MURRAY, S.D.J. Opinions filed (Main opinion by Tauro, D.J., Concurring opinion by Campbell, C.J., dissenting opinion by Murray, S.D.J.) cc/cl and West, Lawyer's Weekly, U.S. Law Week, Commerce Clearing House, NCAIR and Opinion Book & 3 judge court.
- 19 CAMPBELL, C.J., TAURO, D.J. Judgment and Order entered: 1. Judgment for Comm. of Mass. and Division of Civil Service . . . because these depts' are not 'persons' . . . 2. Judgment for pltf against the Mass. Director of Civil Service and the memoes of the Mass. Civil Service Commission . . . IT IS ORDERED that: (a) The Mass. Director of Civil Service and the members of the Mass. Civil Service Commission are hereby permanently enjoined from utilizing Mass Gen Laws ch. 31, § 23 (1971) in any future selection of persons to fill civil service positions with the Commonwealth and (b) This

1978

May

- 3 injunction shall have no effect upon the continued status of any individual in a permanent civil service position who holds that position on the date of this injunction, same distribution as 18.

June

- 13 20 Notice of appeal to the Supreme Court of the United States, FILED by depts. cs.
- 30 Certified copy of docket entries and pleadings listed on index in file forwarded to the U.S. Supreme Court, Wash., D.C.

October

- 16 Rec'd. cert. copy of order of Supreme Court noting probable jurisdiction in this case, filed.

United States District Court for the District of Massachusetts.

No. 74-5061-T.

[Title omitted in printing.]

Complaint and Application for a Three-Judge Court.

The plaintiff alleges as follows:

COUNT I

Jurisdiction and Venue

1. Plaintiff is a female resident and member of the bar of the Commonwealth of Massachusetts (Commonwealth).

2. The defendant Division of Civil Service (Division) is an executive and administrative department of the Commonwealth created under the provisions of Mass. G.L. c. 13, § 2, and by that same statute placed under the supervision and control of the Director of Civil Service (Director) and the Civil Service Commission (Commission). Said Division is charged with administering and enforcing the provisions of the Massachusetts Civil Service Law, Mass. G.L. c. 31.

3. The defendant Edward W. Powers is a resident of the Commonwealth and the Director and as such is an officer of the Commonwealth and administrative and executive head of the Division. This action is brought against him in his official capacity as Director.

4. The defendants Nancy B. Beecher, Wayne 7. Budd, Joseph M. Duffy, Richard J. Healy and Helen C. Mitchell and

each of them is a resident of the Commonwealth and a member of the Commission; and together they comprise the Commission. This action is brought against these defendants and each of them in their official capacities as members of the Commission.

5. This civil action arises under the Constitution of the United States and under 42 U.S.C. § 1983. The amount in controversy, exclusive of interest and costs, exceeds the sum or value of \$10,000.

6. This is an action for declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201 and 2202 commenced to redress the deprivation, under color of the Massachusetts Civil Service Law, Mass. G.L. c. 31, and the rules and regulations promulgated thereunder, of rights of the plaintiff secured to her by the Fourteenth Amendment to the Constitution of the United States.

7. There exists an actual controversy between the plaintiff and the defendants as to the constitutionality of certifying names of persons for employment pursuant to an eligible list for permanent appointment to positions classified Counsel I. A copy of the present list, which is to be amended, is attached hereto and marked "A" and is hereinafter referred to as "the Counsel I Eligible List".

8. Jurisdiction over the claim alleged is thus conferred upon this court by the provisions of 28 U.S.C. §§ 1331(a) and 1343(3).

9. This court is the proper venue for adjudication of the claim alleged by virtue of the provisions of 28 U.S.C. § 1391(b).

Statement of Claim

10. The Division, the Director and the Commission and each of them are charged by the law of the Commonwealth

with the administration and enforcement of the Civil Service Laws of the Commonwealth (G.L. c. 31) which set forth the requirements and procedures to be followed in filling vacancies in the vast majority of the jobs available in the employ of the Commonwealth, its departments, divisions and agencies. As part of these general duties, these defendants and each of them are charged with enforcement of the so-called Veterans' Preference Statute (G.L. c. 31, §§ 21-25) which is a part of the Civil Service Laws of the Commonwealth.

11. Applicants for employment in permanent positions governed by the Civil Service Laws of the Commonwealth are required to undergo some form of competitive examination for such positions. After the competitive examination has been graded, all persons receiving a passing grade are placed upon an eligible list for the position or positions concerned.

12. Appointing authorities of the Commonwealth are required by law to comply with the following procedure in filling vacancies for permanent jobs governed by the Civil Service Laws of the Commonwealth: (a) The appointing authority sends a requisition to the Director stating the number of vacancies which are required to be filled. (b) The Director then certifies, in order of their rank on the eligible list, candidates for the position. The entire list is not certified, rather the number certified is dependent upon the number of positions to be filled. (c) The appointing authority must select a person on the list certified to him. If there is one position to be filled, the appointing authority must select one name from the first three names on the eligible list. If there is more than one position to be filled, the appointing authority selects from a greater number of names in accordance with a formula set forth in Rule 14 of the Civil Service Rules, a copy of which rule is attached hereto and marked "B". Said greater number of names certified to the appointing authority are certified from

the eligible list in the order in which names are ranked on the list.

13. The effect of the Veterans' Preference Statute is to require that all disabled veterans and other veterans who have passed the examination be placed on the eligible list ahead of all other persons who also have passed the examination, which means that every veteran who passes will be certified to the appointing authority ahead of every non-veteran who passes.

14. The defendants have compiled a Counsel I Eligible List for permanent appointment to positions classified Counsel I which is attached hereto and marked "A". This Counsel I Eligible List is an open list which will be continually updated with the names of applicants who become eligible.

15. In 1974 the plaintiff, who is not a veteran, made an application for the competitive examination for permanent appointments to positions classified Counsel I. The Director found the plaintiff qualified for permanent appointment to positions classified Counsel I and placed her name on the eligible list for Counsel I positions.

16. The Director established the Counsel I Eligible List pursuant to the Veterans' Preference Statute by placing the names of the persons who passed the competitive examination for permanent appointment to positions classified Counsel I on the Counsel I Eligible List in the order of (1) disabled veterans, (2) other veterans, and (3) other applicants. Within each group, eligibles are listed in order of their scores on the examination with the highest names listed first.

17. Names will be certified to appointing authorities from the Counsel I Eligible List in the order in which the names appear on said list for permanent appointment to at least fourteen positions classified Counsel I.

18. Plaintiff ranks 57 on the Counsel I Eligible List. Plaintiff tied for the highest score of any person on the Counsel I Eligible List. Solely because of the operation of the Veterans'

Preference Statute 56 veterans rank ahead of plaintiff. No female ranks higher than 57 on the Counsel I Eligible List.

19. Although approximately 10 percent of those eligible for permanent appointment to positions classified Counsel I are female, no female including plaintiff will be certified to any appointing authority for such permanent appointment because of the operation of the Veterans' Preference Statute.

20. Virtually all persons presently holding permanent appointments to counsel positions in the classified civil service of the Commonwealth of Massachusetts are male. Almost all veterans in the Commonwealth are male. For the five-year period 1969 through 1973, approximately 55% of all males passing civil service examinations were veterans, while approximately 1% of all females passing civil service examinations were veterans. Of all veterans passing civil service examinations during the period 1969 through 1973, approximately 98% were males.

21. Defendants' enforcement of the Veterans' Preference Statute has operated and continues to operate to exclude virtually all qualified female applicants from certification for consideration for any permanent appointment to any Counsel I position in the classified civil service of the Commonwealth. Said enforcement has operated and continues to operate to exclude a significantly higher proportion of qualified female applicants from consideration for permanent appointments than it does qualified male applicants.

22. Plaintiff's grade on the unassembled competitive examination for permanent appointment to positions classified Counsel I is such that she would be in the first group certified to appointing authorities for consideration for permanent appointment to such positions but for the Veterans' Preference Statute and the rules and regulations of the Division implementing said Statute and their enforcement by the individual defendants in their official capacities. The salaries for posi-

tions classified Counsel I range from \$12,287.60 to \$15,579.20 per year.

23. The plaintiff has been informed by the Division that the Division will begin certifying names from the Counsel I Eligible List on or about November 5, 1974.

24. The Veterans' Preference Statute and the rules and regulations of the Division in implementing said Statute and their enforcement by the individual defendants in their official capacities deprive plaintiff of the equal protection of the law in violation of the Fourteenth Amendment to the United States Constitution in that they unlawfully discriminate in public employment on the basis of sex by systematically excluding virtually every qualified and eligible female applicant including plaintiff, from certification for consideration for permanent appointment to any Counsel I position in the classified civil service of the Commonwealth.

25. The pending certification described in Paragraph 23 hereof and all further certifications will cause irreparable harm to Plaintiff for which she has no plain and adequate remedy of law.

COUNT II

26. Plaintiff reasserts the averments of Paragraphs 1 through 23 and 25, inclusive, of this Complaint with the same force and effect as if herein set forth and repeated in full.

27. For many years the Commonwealth has excluded females from, or discriminated against females in filling, various positions in public employment including counsel positions. As a result, females continue to be underrepresented in those positions in the classified civil service of the Commonwealth which are most desirable in terms of salary, responsi-

bility and opportunity for advancement, including positions classified Counsel I.

28. Because of the Commonwealth's history of exclusion and discrimination against females in public employment, the defendants are under an affirmative constitutional duty to the plaintiff to eliminate every law, rule and regulation that has the effect of operating in practice to perpetuate the exclusion of, or discrimination against, qualified female applicants with respect to public employment, including the provisions for veterans' preference in the Massachusetts General Laws and in the rules and regulations of the defendant Division of Civil Service.

COUNT III

29. Plaintiff reasserts the averments of Paragraphs 1 through 23 and 25, inclusive, of this Complaint with the same force and effect as if herein set forth and repeated in full.

30. The United States of America has adopted various laws, regulations and practices expressly excluding females from the armed forces and expressly limiting opportunities for females in the armed forces with the effect that females have been and continue to be discouraged by federal law from joining or attempting to join the armed forces of the United States. Such laws and regulations include laws and regulations limiting the percentage of positions in the armed forces open to females, laws and regulations establishing stricter qualifications for females than for males seeking to join the armed forces, laws and regulations discriminating against females as to benefits, positions and promotions available to members of the armed forces, and laws and regulations excluding females from the service academies. Said laws and regulations have created an

environment which has discouraged and discourages females generally from joining the armed forces of the United States.

31. The Veterans' Preference Statute and the rules and regulations of the defendant Division implementing said Statute, and their enforcement by the individual defendants in their official capacities, deprive plaintiff of the equal protection of the law in violation of the Fourteenth Amendment to the United States Constitution in that they unlawfully discriminate in public employment on the basis of sex by the adoption of a qualification for public employment based on incorporating and perpetuating the sex discrimination expressly established by law and regulation in the armed forces of the United States.

WHEREFORE, plaintiff prays:

A. That a three-judge Court be convened pursuant to 28 U.S.C. §§ 2281 and 2284 to hear and determine this action upon at least five days notice of hearing to the Governor and Attorney General of the Commonwealth.

B. That the Court enter judgment declaring that the veterans' preference provisions of the Massachusetts General Laws and of the rules and regulations of the defendant Division implementing said provisions as applied to the eligible list for permanent appointments to positions classified Counsel I violate the Fourteenth Amendment to the United States Constitution and are invalid as so applied.

C. That the Court enter a preliminary injunction enjoining the Commonwealth, its agencies and divisions, including but not limited to the Division of Civil Service, from enforcing the veterans' preference provisions of Mass. G.L. c. 31, §§ 21-25, until this action can be heard and decided on the merits.

D. That the Court permanently enjoin the Commonwealth, its agencies and divisions, including but not limited to the Division of Civil Service, from enforcing the veterans' preference provisions of Mass. G.L. c. 31, §§ 21-25.

E. That the Court grant to plaintiff her costs and expenses of litigation.

F. That the Court grant to plaintiff such other relief as to the Court may seem meet and just.

By her attorneys,

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[Attachment A, entitled "Counsel I Eligible List," has been deleted from the Complaint and has been reproduced as Exhibit 9 to the Agreed Statement of Facts at page 152 of the Appendix.]

ATTACHMENT B.

CERTIFICATION OF OTHER ELIGIBLES

Rule 14.

1. Certification shall be made in the order of the standing on the eligible list, except as provided in Section 4 of this rule, as follows: —

For 1 vacancy,	3 names	For 4 vacancies,	6 names
2 vacancies,	4 names	5 vacancies,	7 names
3 vacancies,	5 names		

For each multiple of five vacancies, the same multiple of seven names; for vacancies from one to four, inclusive, over a multiple of five, additional names according to the above table.

**United States District Court
for the District of Massachusetts.**

No. 74-5061-T

[Title omitted in printing.]

Amended Complaint.

The plaintiffs allege as follows:

COUNT I

Jurisdiction and Venue

1. Plaintiffs are each female residents and members of the Bar of the Commonwealth of Massachusetts (the "Commonwealth").

2. The defendant Division of Civil Service (the "Division") is an executive and administrative department of the Commonwealth created under the provisions of Mass. G.L. c. 13, § 2, and by that statute placed under the supervision and control of the Director of Civil Service (the "Director") and the Civil Service Commission (the "Commission"). The Division is charged with administering and enforcing the provisions of the Massachusetts Civil Service Law, Mass. G.L. c. 31.

3. The defendant Edward W. Powers, a resident of the Commonwealth, is the present Director and is an officer of the Commonwealth and administrative and executive head of the

Division. This action is brought against him individually and in his official capacity as Director.

4. The defendants Nancy B. Beecher, Wayne A. Budd, Joseph M. Duffy, Richard J. Healy and Helen C. Mitchell and each of them is a resident of the Commonwealth and a member of the Commission, and together they comprise the Commission. This action is brought against these defendants and each of them individually and in their official capacities as members of the Commission.

5. This civil action arises under the Constitution of the United States and under 42 U.S.C. § 1983. The amount in controversy, exclusive of interest and costs, exceeds the sum or value of \$10,000.

6. This is an action for declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201 and 2202 commenced to redress the deprivation, under color of the Massachusetts Civil Service Law, Mass. G.L. c. 31, and the rules and regulations promulgated thereunder, of rights of the plaintiffs secured to them by the Fourteenth Amendment to the Constitution of the United States.

7. There exists an actual controversy between the plaintiffs and the defendants as to the constitutionality of the hiring practice, prescribed by G.L. c. 31, which gives to qualified candidates for permanent positions in the Classified Civil Service who are veterans a preference in rank over non-veteran qualified candidates on the eligible lists from which certifications to permanent positions in the Classified Civil Service are made.

8. Jurisdiction over the claim alleged is thus conferred upon this court by the provisions of 28 U.S.C. § 1391(b).

9. This court is the proper venue for adjudication of the claim alleged by virtue of the provisions of 28 U.S.C. § 1391(b).

Statement of Claim

10. The Division, the Director and the Commission and each of them are charged by the law of the Commonwealth with the administration and enforcement of the Civil Service Laws of the Commonwealth (G.L. c. 31) which set forth the requirements and procedures to be followed in filling vacancies in the vast majority of the jobs available in the employ of the Commonwealth, its departments, divisions and agencies. As part of these general duties, these defendants and each of them are charged with enforcement of the so-called Veterans' Preference Statute (G.L. c. 31 §§ 21-25).

11. Applicants for employment in permanent positions governed by the Civil Service Laws of the Commonwealth are required to undergo some form of competitive examination for such positions. After the competitive examination has been graded, all persons receiving a passing grade are placed upon an eligible list for the position or positions concerned.

12. Appointing authorities of the Commonwealth are required by law to comply with the following procedure in filling vacancies for permanent jobs governed by the Civil Service Laws of the Commonwealth: (a) The appointing authority sends a requisition to the Director stating the number of vacancies which are required to be filled. (b) The Director then certifies, in order of their rank on the eligible list, candidates for the position. The entire list is not certified, rather the number certified is dependent upon the number of positions to be filled. (c) The appointing authority must select a person on the list certified to him. If there is one position to be filled, the appointing authority must select one name from the first three names on the eligible list. If there is more than one position to be filled, the appointing authority selects from a greater number of names in accordance with a formula set forth in Rule 14 of the Civil Service Rules, a copy of which rule

is attached hereto and marked "A". Said greater number of names certified to the appointing authority are certified from the eligible list in the order in which names are ranked on the list.

13. The effect of the Veterans' Preference Statute is to require that all disabled veterans and other veterans who have passed the examination be placed on the eligible list ahead of all other persons who also have passed the examination, which means that every veteran who passes will be certified to the appointing authority ahead of every non-veteran who passes.

14. The defendants compiled an eligible list for permanent appointment to positions classified Counsel I, a copy of which is attached hereto and marked "B" and is hereinafter referred to as "the Counsel I Eligible List."

15. In 1974 the plaintiffs, none of whom are veterans, made applications for the competitive examination for permanent appointments to positions classified Counsel I. The Director found each of the plaintiffs qualified for permanent appointment to positions classified Counsel I and placed the names of plaintiff Anthony and plaintiff Gittes on the eligible list for Counsel I positions. Plaintiff Noonan did not appear on the Counsel I Eligible List (Attachment "B") but is informed, believes and alleges that because the list was an open list her name would have been added to the list before any names were certified from the list to any appointing authority.

16. The Director established the Counsel I Eligible List pursuant to the Veterans' Preference Statute by placing the names of the persons who passed the competitive examination for permanent appointment to positions classified Counsel I on the Counsel I Eligible List in the order of (1) disabled veterans, (2) other veterans, and (3) other applicants. Within each group, eligibles were listed in order of their scores on the examination with the highest names listed first.

17. Names would have been certified to appointing authorities from the Counsel I Eligible List in the order in which the names appeared on said list for permanent appointment to at least fourteen positions classified Counsel I, were it not for the preliminary injunction previously entered in this action.

18. Plaintiff Anthony was ranked 57 on the Counsel I Eligible List. Plaintiff Anthony tied for the highest score (94) of any person on the Counsel I Eligible List. As a result of the operation of the Veterans' Preference Statute 56 male veterans were ranked ahead of plaintiff Anthony. No female was ranked higher than 57 on the Counsel I Eligible List. Plaintiff Gittes was ranked 76 on the Counsel I Eligible List. Plaintiff Gittes tied for the second highest score (92) of any person on the Counsel I Eligible List. Plaintiff Noonan also received a score of 92 but re-applied and was informed that her score would be adjusted to a 94, the highest score received by an applicant for Counsel I. As a result of the operation of the Veterans' Preference Statute 54 male veterans with equal or, in the case of 52 male veterans, lower scores were ranked ahead of plaintiff Gittes and plaintiff Noonan.

19. Although each of the plaintiffs received one of the two highest scores achieved on the Counsel I exam, not one of the plaintiffs was certified to any appointing authority for permanent appointment to Counsel I positions. Application of the Veterans' Preference Statute ranked each of the plaintiffs below all lower scoring and all male veterans so that each of the plaintiffs was excluded from any possibility of being considered for permanent Counsel I positions for which there were requisitions.

20. Although approximately 10% of those on the Counsel I Eligible List were female, the operation of the Veterans' Preference Statute placed each female on the eligible list in such a low position that she was excluded from any possibility

of being considered for permanent positions for which there were requisitions.

21. All persons presently holding permanent appointments to counsel positions in the Classified Civil Service of the Commonwealth of Massachusetts are male. Approximately 98% of all veterans in the Commonwealth are male. For the five-year period 1969 through 1973, approximately 55% of all males passing civil service examinations were veterans, while approximately 1% of all females passing civil service examinations were veterans. Of all veterans passing civil service examinations during the period 1969 through 1973, approximately 98% were males.

22. Defendants' enforcement of the Veterans' Preference Statute excluded virtually all qualified female applicants from consideration for any permanent appointment to any Counsel I position in the classified civil service of the Commonwealth. Said enforcement excluded a significantly higher proportion of qualified female applicants from consideration for permanent appointments than it did qualified male applicants.

23. Each of the plaintiffs' grades on the unassembled competitive examination for permanent appointment to positions classified Counsel I was such that she would have been certified to appointing authorities for consideration for permanent appointment to such positions but for the Veterans' Preference Statute and the rules and regulations of the Division implementing said Statute and their enforcement by the individual defendants.

24. The salaries for positions classified Counsel I range from \$12,287.60 to \$15,579.20 per year.

25. Were it not for the preliminary injunction entered in this action, the Division would have begun certifying names from the Counsel I Eligible List on or about November 5, 1974.

26. The Classified Civil Service of the Commonwealth includes many thousands of permanent positions. The Veterans' Preference Statute applies to each of these positions. Veterans' preference systematically excludes female applicants from those positions for which both men and women compete by establishing eligible lists which give absolute preference to veterans, virtually all of whom are male. Male veterans compete for a large number of the more desirable and higher paying permanent positions in the Classified Civil Service in numbers large enough to have the practical effect of excluding from consideration for appointment virtually all female applicants, including the plaintiffs. Each of the plaintiffs desires to be able to compete for any position in the Classified Civil Service without being eliminated from consideration by operation of the Veterans' Preference Act. The Veterans' Preference Act grants a preference to a disproportionate number of male applicants on the basis of a criterion that is related neither to ability nor to performance in permanent positions in the Classified Civil Service.

27. The actions of defendants in applying the Veterans' Preference Statute to place the name of the plaintiff Anthony on the Counsel I eligible list behind less qualified male veterans have humiliated and degraded her and caused her consequent mental distress and emotional anxiety. Plaintiff Anthony has thereby been damaged as a result of the unconstitutional actions of defendants under color of state law.

28. Plaintiff Anthony presently holds a provisional appointment in the Classified Civil Service of the Commonwealth and is interested in being able to compete equally with male candidates for permanent positions in the Classified Civil Service. Plaintiff Anthony will by operation of the Veterans' Preference Act be eliminated from consideration for any permanent position for which she applies and for which men and women compete. Plaintiff Anthony, having been eliminated from

consideration from Counsel I positions by operation of the Veterans' Preference Statute, is discouraged from applying for other permanent positions and thereby being subjected again to the humiliation and degradation and consequent mental distress and emotional anxiety caused by being excluded by reason of the operation of the Veterans' Preference Act. Plaintiff Anthony has suffered and continues to suffer mental distress and emotional anxiety from the Commonwealth's continued use of the Veterans' Preference Statute in the hiring process for all permanent positions in the Classified Civil Service.

29. The action of the defendants in applying the Veterans' Preference Statute to place the name of the plaintiff Gittes on the Counsel I eligible list behind less qualified male veterans have humiliated and degraded her and caused her consequent mental distress and emotional anxiety. Plaintiff Gittes has, thereby been damaged as a result of the unconstitutional actions of defendants under color of state law.

30. Plaintiff Gittes is interested in a career in state service and desires to be able to compete equally with male candidates for permanent positions in the Classified Civil Service. Plaintiff Gittes intends to apply for other permanent positions in the Classified Civil Service but will, by the operation of the Veterans' Preference Statute, be eliminated from consideration for any permanent position for which she applies and for which men and women compete. Plaintiff Gittes, having been eliminated from consideration from Counsel I positions by operation of the Veterans' Preference Act, is discouraged from applying for other permanent positions and thereby being subjected again to the humiliation and degradation and consequent mental distress and emotional anxiety caused by being excluded from consideration by reason of the operation of the Veterans' Preference Statute. Plaintiff Gittes has suffered and continues to suffer mental distress and emotional anxiety from

the Commonwealth's continued use of the veterans' preference in the hiring process for all permanent positions in the Commonwealth.

31. The actions of defendants in applying the Veterans' Preference Act to place the name of the plaintiff Noonan on the Counsel I eligible list behind less qualified male veterans have humiliated and degraded her and caused her consequent mental distress and emotional anxiety. Plaintiff Noonan has thereby been damaged as a result of the unconstitutional actions of defendants under color of state law.

32. Plaintiff Noonan presently holds a provisional appointment as a hearing examiner in the Classified Civil Service of the Commonwealth and, in addition to applying for Counsel I positions, will make application for a permanent position as a hearing examiner in the Classified Civil Service when the next examination for such a position is held.

33. Plaintiff Noonan is informed that no examination for permanent appointment to the position of hearing examiner has been held since 1967. It is likely that a notice of examination will be posted in the near future.

34. On information and belief, the majority of permanent positions of hearing examiner are filled by males.

35. When the next examination for permanent appointment to the position of hearing examiner is held, the defendants will apply the Veterans' Preference Statute to place on the eligible list for positions of permanent hearing examiner the names of male veterans who are less qualified than female applicants ahead of virtually all female applicants including plaintiff Noonan.

36. Plaintiff Noonan will be excluded from consideration for a permanent appointment as a hearing examiner by reason of the operation of the Veterans' Preference Statute in the same way she has already been excluded from consideration for a permanent appointment to a Counsel I position. Appli-

cation of the Veterans' Preference Statute to the position of hearing examiner will deprive the plaintiff Noonan of the equal protection of the law and due process in violation of the Fourteenth Amendment to the United States Constitution.

37. Plaintiff Noonan has suffered and continues to suffer mental distress and emotional anxiety from the defendant's continued application of the Veterans' Preference Statute in the hiring process for all permanent positions in the civil service and in particular for both Counsel I positions and the position of permanent hearing examiner for which she intends to apply.

38. The Veterans' Preference Statute and the rules and regulations of the Division in implementing said Statute and their enforcement by the individual defendants have deprived and continue to deprive the plaintiffs of the equal protection of the laws and of due process of law in violation of the Fourteenth Amendment to the United States Constitution in that they unlawfully discriminated in public employment on the basis of sex by systematically excluding qualified and eligible female applicants, including plaintiffs, from certification for consideration for permanent appointment to Counsel I positions in the Classified Civil Service of the Commonwealth and in that they continue to discriminate unlawfully in public employment on the basis of sex by systematically excluding qualified and eligible female applicants, including plaintiffs, from certification for considerations for permanent appointments to other positions in the Classified Civil Service of the Commonwealth.

39. The continued application of the Veterans' Preference Act to positions in the Classified Civil Service for which plaintiffs are interested in being able to compete equally with male candidates is causing irreparable harm to plaintiffs for which they have no plain and adequate remedy at law.

COUNT II

40. Plaintiffs reassert the averments of Paragraphs 1 through 39, inclusive, of this Complaint with the same force and effect as if herein set forth and repeated in full.

41. For many years the Commonwealth has excluded females from, or discriminated against females in filling, various positions in public employment including counsel positions and hearing examiner positions. As a result, females continue to be underrepresented in the positions in the Classified Civil Service of the Commonwealth which are most desirable in terms of salary, responsibility and opportunity for advancement, including positions classified Counsel I and hearing examiner.

42. Because of the Commonwealth's history of exclusion and discrimination against females in public employment, the defendants are under an affirmative constitutional duty to the plaintiffs to eliminate every law, rule and regulation that has the effect of operating in practice to perpetuate the exclusion of, or discrimination against, qualified female applicants with respect to public employment, including the provisions for veterans preference in the Massachusetts General Laws and in the rules and regulations of the defendant Division of Civil Service.

COUNT III

43. Plaintiffs reassert the averments of Paragraphs 1 through 39, inclusive, of this Complaint with the same force and effect as if herein set forth and repeated in full.

44. The United States of America has adopted various laws, regulations and practices expressly excluding females from the armed forces and expressly limiting opportunities for females

in the armed forces with the effect that females have been and continue to be discouraged by federal law from joining or attempting to join the armed forces of the United States. Such laws and regulations include laws and regulations limiting the percentage of positions in the armed forces open to females, laws and regulations establishing stricter qualifications for females than for males seeking to join the armed forces, laws and regulations discriminating against females as to benefits, positions and promotions available to members of the armed forces, and laws and regulations excluding females from the service academies. Said laws and regulations have created an environment which has discouraged and discourages females generally from joining the armed forces of the United States.

45. The Veterans' Preference Statute and the rules and regulations of the defendant Division implementing said Statute, and their enforcement by the individual defendants deprive plaintiffs of the equal protection of the law and due process in violation of the Fourteenth Amendment to the United States Constitution in that they unlawfully discriminate in public employment on the basis of sex by the adoption of a qualification for public employment based on incorporating and perpetuating the sex discrimination expressly established by law and regulation in the armed forces of the United States.

WHEREFORE, plaintiffs pray:

A. That a three-judge Court be convened pursuant to 28 U.S.C. §§ 2281 and 2284 to hear and determine this action upon at least five days notice of hearing to the Governor and Attorney General of the Commonwealth.

B. That the Court enter judgment declaring that the veterans' preference provisions of the Massachusetts General Laws and of the rules and regulations of the defendant Division implementing said provisions as applied to eligible lists for permanent appointments to positions in the Classified Civil Serv-

ice violate the Fourteenth Amendment to the United States Constitution and are invalid as so applied.

C. That the Court enter a preliminary injunction enjoining the Commonwealth, its agencies and divisions, including but not limited to the Division of Civil Service, from enforcing the veterans' preference provisions of Mass. G.L. c. 31, §§ 21-25, until this action can be heard and decided on the merits.

D. That the Court permanently enjoin the Commonwealth, its agencies and divisions, including but not limited to the Division of Civil Service, from enforcing the veterans' preference provisions of Mass. G.L. c. 31, §§ 21-25.

E. That judgment be entered against each individual defendant in favor of each plaintiff in the amount of one dollar (\$1.00) nominal damages.

F. That the Court order that the defendants undertake appropriate affirmative action in the hiring of female applicants for counsel positions so that the past effects of prior discrimination are eliminated.

G. That the Court grant to plaintiffs their costs and expenses of litigation.

H. That the Court grant to plaintiffs such further and other related relief as to the Court may seem meet and just.

By their attorneys,

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ATTACHMENT A.

CERTIFICATION OF OTHER ELIGIBLES

Rule 14.

1. Certification shall be made in the order of the standing on the eligible list, except as provided in Section 4 of this rule, as follows:—

For 1 vacancy,	3 names	For 4 vacancies,	6 names
2 vacancies,	4 names	5 vacancies,	7 names
3 vacancies,	5 names		

For each multiple of five vacancies, the same multiple of seven names; for vacancies from one to four, inclusive, over a multiple of five, additional names according to the above table.

[Attachment B, entitled "Counsel I Eligible List," has been deleted from the Amended Complaint and has been reproduced as Exhibit 9 to the Agreed Statement of Facts at page 152 of the Appendix.]

**United States District Court
for the District of Massachusetts.**

No. 75-1991-T

[Title omitted in printing.]

Complaint.

The plaintiff alleges as follows:

COUNT I

Jurisdiction and Venue

1. The plaintiff is a female resident of the Commonwealth of Massachusetts (the "Commonwealth").

2. The defendant Division of Civil Service (the "Division") is an executive and administrative department of the Commonwealth created under the provisions of Mass. G.L. c. 13, § 2, and by that statute placed under the supervision and control of the Director of Civil Service (the "Director") and the Civil Service Commission (the "Commission"). The Division is charged with administering and enforcing the provisions of the Massachusetts Civil Service Law, Mass. G.L. c. 31.

3. The defendant Edward W. Powers, a resident of the Commonwealth, is the present Director and is an officer of the Commonwealth and administrative and executive head of the Division. This action is brought against him in his official capacity as the Director.

4. The defendants Nancy B. Beecher, Wayne A. Budd, Joseph M. Duffy, Richard J. Healy and Helen C. Mitchell, residents of the Commonwealth, are members of the Commission and together comprise the Commission. This action is brought against these defendants in their official capacities as members of the Commission.

5. This civil action arises under the Constitution of the United States and under 42 U.S.C. § 1983. The amount in controversy, exclusive of interest and costs, exceeds the sum or value of \$10,000.

6. This is an action for declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201 and 2202 commenced to redress the deprivation, under color of the Massachusetts Civil Service Law, Mass. G.L. c. 31, and the rules and regulations promulgated thereunder, of rights of the plaintiff secured to her by the Fourteenth Amendment to the Constitution of the United States.

7. There exists an actual controversy between the plaintiff and the defendants as to the constitutionality of the hiring practice, prescribed by G.L. c. 31, which gives to qualified candidates for permanent positions in the Classified Civil Service who are veterans a preference in rank over non-veteran qualified candidates on the eligible lists from which certifications to permanent positions in the Classified Civil Service are made.

8. Jurisdiction over the claim alleged is thus conferred upon this court by the provisions of 28 U.S.C. §§ 1331(a) and 1343(3).

9. This court is the proper venue for adjudication of the claim alleged by virtue of the provisions of 28 U.S.C. § 1391(b).

Statement of Claim

10. The Division, the Director and the Commission and each of them are charged by the law of the Commonwealth

with the administration and enforcement of the civil service laws of the Commonwealth which set forth the requirements and procedures to be followed in filling vacancies in the vast majority of the jobs available in the employ of the Commonwealth, its departments, divisions and agencies. As part of these general duties, these defendants and each of them are charged with enforcement of the so-called Veterans' Preference Statute (G.L. c. 31, §§ 21-25).

11. Applicants for employment in permanent positions governed by the civil service laws of the Commonwealth are required to undergo some form of competitive examination for such positions. After the competitive examination has been graded, all persons receiving a passing grade are placed upon an eligible list for the position or positions concerned.

12. Appointing authorities of the Commonwealth are required by law to comply with the following procedure in filling vacancies for permanent jobs governed by the civil service laws of the Commonwealth: The appointing authority sends a requisition to the Director stating the number of vacancies which are required to be filled. The Director then certifies candidates for the position in order of their rank on the eligible list. If there is one position to be filled, the appointing authority must select one of the first three available candidates on the eligible list. If there is more than one position to be filled, the appointing authority must select from the number of the highest ranking available candidates on the eligible list which is prescribed by Rule 14 of the Civil Service Rules, a copy of which rule is attached hereto and marked "A".

13. The effect of the Veterans' Preference Statute is to require that all veterans who have passed the examination be placed on the eligible list ahead of all other persons who also have passed the examination.

14. The plaintiff, who is not a veteran, made application for the competitive examination for permanent appointment to one position classified Head Administrative Assistant at the Solomon Mental Health Center in the Department of Mental

Health of the Commonwealth. The plaintiff achieved the third highest score (92.32) on the competitive examination for Head Administrative Assistant held on February 24, 1973. The Director found the plaintiff qualified for permanent appointment to that position and placed her name on the eligible list therefor, a copy of which is attached hereto and marked "B" and is hereinafter referred to as "the Head Administrative Assistant Eligible List".

15. The Director established the Head Administrative Assistant Eligible List on August 24, 1973, pursuant to the Veterans' Preference Statute by placing the names of the persons who passed the competitive examination for permanent appointment to the position classified Head Administrative Assistant on the Head Administrative Assistant Eligible List in the order of (1) disabled veterans, (2) other veterans, and (3) other applicants. Within each group, eligible persons were ranked in order of their scores on the examination with those receiving the highest scores ranked first.

16. The Director placed the name of the plaintiff eleventh on the Head Administrative Assistant Eligible List. Pursuant to the Veterans' Preference Statute, he placed on the Head Administrative Assistant Eligible List ahead of the name of the plaintiff the names of eight male veterans who received lower scores on the competitive examination than the plaintiff. Pursuant to the Veterans' Preference Statute, he thereafter added to the Head Administrative Assistant Eligible List ahead of the name of the plaintiff the names of three additional male veterans who received lower scores on the competitive examination than the plaintiff. The plaintiff is now ranked fourteenth on the Head Administrative Assistant Eligible List. But for the Veterans' Preference Statute and its application by the defendants, the plaintiff would be ranked third on the Head Administrative Assistant Eligible List.

17. Pursuant to Rule 14 of the Civil Service Rules, the Director certified to the appointing authority for the one permanent position as Head Administrative Assistant the first three names on the Head Administrative Assistant Eligible List, each of which was the name of a male veteran. But for the Veterans' Preference Statute, the Director would have certified the name of the plaintiff.

18. The position of Head Administrative Assistant has not yet been filled.

19. Twelve of the fifteen males on the Head Administrative Assistant Eligible List are veterans. None of the four females on the Head Administrative Assistant Eligible List is a veteran.

20. The plaintiff, who is not a veteran, made application for the competitive examination for permanent appointment to positions classified Administrative Assistant. The plaintiff received a score of 87 on the competitive examination for Administrative Assistant held on May 18, 1974. The Director found the plaintiff qualified for permanent appointment to positions classified Administrative Assistant and placed her name on the eligible list therefor, a copy of which is attached hereto marked "C" and is hereinafter referred to as "the Administrative Assistant Eligible List".

21. The Director established the Administrative Assistant Eligible List in April, 1975, pursuant to the Veterans' Preference Statute by placing the names of the persons who passed the competitive examination for permanent appointment to positions classified Administrative Assistant on the Administrative Assistant Eligible List in the order of (1) disabled veterans, (2) other veterans, and (3) other applicants. Within each group, eligible persons were ranked in order of their scores on the examination with those receiving the highest scores ranked first.

22. The Director placed the name of the plaintiff seventieth on the Administrative Assistant Eligible List. Pursuant to the Veterans' Preference Statute, he placed on the Administrative Assistant Eligible List ahead of the name of the plaintiff the names of fifty-two veterans, fifty of whom received lower

scores than, and two of whom received equal scores to, the plaintiff on the competitive examination. But for the Veterans' Preference Statute and its application by the defendants, the plaintiff would be tied for seventeenth on the Administrative Assistant Eligible List.

23. As of April 23, 1975, there were requisitions for seven permanent positions classified as Administrative Assistant to be filled from the Administrative Assistant Eligible List. All additional requisitions for permanent positions classified as Administrative Assistant through April, 1977, will be filled from the Administrative Assistant Eligible List.

24. On May 13, 1975, the Director began certifying names to appointing authorities from the Administrative Assistant Eligible List.

25. By operation of the Veterans' Preference Statute and the rules and regulations of the Division implementing said Statute and by reason of their enforcement by the defendants, the plaintiff is excluded from any reasonable possibility of being in the group of eligible persons from which the respective appointing authorities will be required to fill the seven permanent positions classified as Administrative Assistant for which there were requisitions as of April 23, 1975. The seven permanent positions classified as Administrative Assistant for which there were requisitions as of April 23, 1975, have not yet been filled.

26. By operation of the Veterans' Preference Statute and the rules and regulations of the Division implementing said Statute and by reason of their threatened enforcement by the defendants, the plaintiff has a significantly reduced opportunity of being in the group of eligible persons from which appointing authorities will be required to fill permanent positions classified as Administrative Assistant for which requisitions are issued through April, 1977. But for the Veterans' Preference Statute and the rules and regulations of the Divi-

sion implementing said Statute, the plaintiff would be in the group of eligible persons from which appointing authorities will be required to fill permanent positions classified as Administrative Assistant prior to April, 1977.

27. Three of the sixteen eligible persons who received higher scores than plaintiff are also female persons, are also not veterans and are ranked on the Administrative Assistant Eligible List sixty-fifth, sixty-seventh and sixty-eighth. But for the Veterans' Preference Statute and the rules and regulations of the Division implementing said Statute these other female eligible persons would be ranked fifth, tied for tenth and tied for twelfth. The Veterans' Preference Statute and the rules and regulations of the Division implementing said Statute and their enforcement by defendants has excluded these other eligible female persons from being in the group of eligible persons from which respective appointing authorities will be required to select persons for appointment to permanent positions classified as Administrative Assistant.

28. Approximately 20% of those persons qualified for appointment to permanent positions classified Administrative Assistant are female, but no female will be in the group of persons from which appointing authorities will be required to select persons for appointment to the permanent positions classified as Administrative Assistant for which seven requisitions are presently outstanding.

29. Sixty-two of the sixty-three veterans on the Administrative Assistant Eligible List are males. Of the 136 males on the Administrative Assistant Eligible List, sixty-two (or 45.6%) are veterans. Of the 27 females on the Administrative Assistant Eligible List, only one (or 3.7%) is a veteran.

30. About 98% of all veterans in the Commonwealth are male. For the five-year period 1969 through 1973, approximately 55% of all males passing civil service examinations were veterans, while approximately 1% of all females passing

civil service examinations were veterans. Of all veterans passing civil service examinations during the period 1969 through 1973, approximately 98% were males.

31. Defendants' enforcement of the Veterans' Preference Statute excludes most qualified female applicants from consideration for appointment to permanent Administrative Assistant positions in the classified civil service of the Commonwealth. Said enforcement has excluded and will continue to exclude a significantly higher proportion of qualified female applicants from consideration for permanent appointments than it does qualified male applicants.

32. The salaries for positions classified Head Administrative Assistant and Administrative Assistant are in excess of \$10,000 per year.

33. For the past twelve years, the plaintiff has been a career civil servant in the employ of the Commonwealth. On March 28, 1975, she was laid off from a permanent position in the Classified Civil Service of the Commonwealth as State Federal Funds and Personnel Coordinator in the Civil Defense Agency of the Commonwealth. At the time she was laid off, she had held that permanent position for approximately eight years. The Veterans' Preference Statute grants to disabled veterans a preference when employees are laid off by requiring that disabled veterans be laid off after all other employees.

34. The plaintiff has in the past been denied job opportunities by the Veterans' Preference Statute, the rules and regulations of the Division implementing said Statute and their enforcement by the defendants. She has been excluded from consideration, and has been delayed in being reached for consideration, for many positions for which she has applied in the Classified Civil Service of the Commonwealth because male veterans with lower scores were ranked ahead of her on eligible lists.

35. The plaintiff is at the present time unemployed. She desires to continue to be a career civil servant in the employ of

the Commonwealth by obtaining a permanent position as a Head Administrative Assistant or an Administrative Assistant.

36. The Veterans' Preference Statute and the rules and regulations of the Division implementing said Statute and their enforcement by the defendants have deprived and continue to deprive the plaintiff of the equal protection of the laws and of due process of law in violation of the Fourteenth Amendment to the United States Constitution in that they unlawfully discriminate in public employment on the basis of sex by systematically excluding qualified and eligible female applicants, including the plaintiff, from the group of eligible persons from which appointing authorities are required to make selections for appointment to permanent positions in the Classified Civil Service of the Commonwealth.

37. Unless restrained by this Court, the defendants will use the Administrative Assistant Eligible List to fill the seven permanent positions classified as Administrative Assistant for which there were requisitions as of April 23, 1975, and any additional permanent positions classified as Administrative Assistant for which requisitions are issued.

38. The Head Administrative Assistant Eligible List will expire on August 24, 1975. The appointing authority has thus far not appointed any of the three persons who were certified and whose names appear highest on that list. Unless restrained by this Court, the appointing authority will make such appointment or the defendants will permit the Head Administrative Assistant Eligible List to expire before the plaintiff can be considered for appointment to the one available position as Head Administrative Assistant.

39. The use for positions classified as Head Administrative Assistant and Administrative Assistant of eligible lists established in accordance with the Veterans' Preference Statute and the rules and regulations of the Division implementing said Statute is causing irreparable harm to the plaintiff for which she has no plain and adequate remedy at law.

COUNT II

40. The plaintiff reasserts the averments of Paragraphs 1 through 39, inclusive, of this Complaint with the same force and effect as if herein set forth and repeated in full.

41. For many years the Commonwealth has excluded females from, or discriminated against females in filling, various positions in public employment. As a result, females continue to be underrepresented in the positions in the Classified Civil Service of the Commonwealth which are most desirable in terms of salary, responsibility and opportunity for advancement, including positions classified Head Administrative Assistant and Administrative Assistant.

42. Because of the Commonwealth's history of discrimination against females in public employment, the defendants are under an affirmative constitutional duty to the plaintiff to eliminate every law, rule and regulation that has the effect of operating in practice to perpetuate the discrimination against qualified female applicants in public employment, including the Veterans' Preference Statute and the rules and regulations of the Division implementing said Statute.

COUNT III

43. The plaintiff reasserts the averments of Paragraphs 1 through 39, inclusive, of this Complaint with the same force and effect as if herein set forth and repeated in full.

44. The United States of America has adopted various laws, regulations and practices expressly excluding females from the armed forces and expressly limiting opportunities for females in the armed forces with the effect that females have been and continue to be discouraged by federal law from joining or attempting to join the armed forces of the United States. Such

laws and regulations include laws and regulations limiting the percentage of positions in the armed forces open to females, laws and regulations establishing stricter qualifications for females than for males seeking to join the armed forces, laws and regulations discriminating against females as to benefits, positions and promotions available to members of the armed forces, and laws and regulations excluding females from the service academies. Said laws and regulations have created an environment which has discouraged and discourages females generally from joining the armed forces of the United States.

45. The Veterans' Preference Statute and the rules and regulations of the defendant Division implementing said Statute and their enforcement by the individual defendants deprive plaintiff of the equal protection of the laws and of due process in violation of the Fourteenth Amendment to the United States Constitution in that they unlawfully discriminate in public employment on the basis of sex by the adoption of a qualification for public employment which incorporates and perpetuates the sex discrimination expressly established by law and regulation in the armed forces of the United States.

WHEREFORE, the plaintiff prays:

A. That a three-judge Court be convened pursuant to 28 U.S.C. §§ 2281 and 2284 to hear and determine this action upon at least five days' notice of hearing to the Governor and Attorney General of the Commonwealth.

B. That the Court enter a preliminary injunction enjoining the defendants, their officers, agents, servants, employees, and attorneys from filling any permanent position in the Classified Civil Service of the Commonwealth classified as Administrative Assistant until this action can be heard and decided on the merits.

C. That the Court enter a preliminary injunction enjoining the defendants, their officers, agents, servants, employees,

and attorneys from filling the permanent position of Head Administrative Assistant at the Solomon Mental Health Center in the Department of Mental Health of the Commonwealth until this action can be heard and decided on the merits.

D. That the Court enter a preliminary injunction enjoining the defendants, their officers, agents, servants, employees, and attorneys from permitting the eligible list for the position of Head Administrative Assistant at the Solomon Mental Health Center in the Department of Mental Health of the Commonwealth to expire before this action can be heard and decided on the merits.

E. That the Court enter a permanent injunction enjoining the defendants, their officers, agents, servants, employees, and attorneys from granting any preference to veterans or disabled veterans in filling positions in the Classified Civil Service of the Commonwealth classified as Head Administrative Assistant or Administrative Assistant.

F. That the Court enter a permanent mandatory injunction ordering the defendant Director to reestablish the Head Administrative Assistant Eligible List and the Administrative Assistant Eligible List by ranking the eligible persons thereon solely in the order of their scores without reference to any preference accorded to any person by Mass. G.L. c. 31, §§ 21-25.

G. That the Court enter a permanent mandatory injunction ordering the defendants, their officers, agents, servants, employees, and attorneys to consider for appointment to the permanent position of Head Administrative Assistant at the Solomon Mental Health Center in the Department of Mental Health of the Commonwealth the three highest ranking available eligible persons on the Head Administrative Assistant Eligible List.

H. That the Court enter a permanent injunction ordering the defendants, their officers, agents, servants, employees,

and attorneys to undertake such affirmative action to hire qualified female applicants for permanent positions as Administrative Assistants as to the Court may seem meet and just upon the evidence to eradicate the present effects of past sex discrimination in filling such positions.

I. That the Court enter a permanent injunction enjoining the defendants, their officers, agents, servants, employees, and attorneys from applying the Veterans Preference Statute, Mass. G.L. c. 31, §§ 21-25, to eligible lists for permanent positions in the Classified Civil Service of the Commonwealth where its effect is to grant to male veterans a preference over female non-veterans in the ranking on such eligible lists.

J. That the Court enter a declaratory judgment that the Veterans' Preference Statute, Mass. G.L. c. 31, §§ 21-25, is unconstitutional as applied to positions in the Classified Civil Service of the Commonwealth classified as Head Administrative Assistant or Administrative Assistant.

K. That the Court enter a declaratory judgment that the Veterans' Preference Statute, Mass. G.L. c. 31, §§ 21-25, is unconstitutional.

L. That the Court grant to the plaintiff her costs and expenses of litigation.

M. That the Court grant to the plaintiff such further and other related relief as to the Court may seem meet and just.

By her attorneys,

RICHARD P. WARD
JOHN SILAS HOPKINS, III
STEPHEN B. PERLMAN
ELEANOR D. ACHESON

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May 20, 1975

ATTACHMENT A.
CERTIFICATION OF OTHER ELIGIBLES

Rule 14.

1. Certification shall be made in the order of the standing on the eligible list, except as provided in Section 4 of this rule, as follows: —

For 1 vacancy,	3 names	For 4 vacancies,	6 names
2 vacancies,	4 names	5 vacancies,	7 names
3 vacancies,	5 names		

For each multiple of five vacancies, the same multiple of seven names; for vacancies from one to four, inclusive, over a multiple of five, additional names according to the above table.

Eligible List," has been deleted from the Complaint and has been reproduced as Exhibit 2 to the Agreed Statement of Facts at page 104 of the Appendix.]

[Attachment C, entitled "Administrative Assistant Eligible List," has been deleted from the Complaint and has been reproduced as Exhibit 6 to the Agreed Statement of Facts at page 113 of the Appendix.]

**United States District Court
for the District of Massachusetts.**

No. 74-5061-T.

[Title omitted in printing.]

**Plaintiffs' Motion to Consolidate for Trial this Action with
Feeney v. The Commonwealth of Massachusetts, et al.,
Civil Action No. 75-1991-T.**

The plaintiffs move pursuant to Fed. R. Civ. P. 42(a) to consolidate *Feeney v. The Commonwealth of Massachusetts, et al.*, Civil Action No. 75-1991-T, with this action for trial on the following grounds:

1. The actions involve common questions of law concerning the constitutionality of the Massachusetts Veterans' Preference Statute. The actions involve a substantial number of common issues of fact.

2. Consolidation of these actions would save substantial time of the Court and the parties and would not prejudice any party.

By their attorneys,
RICHARD P. WARD
JOHN SILAS HOPKINS, III
STEPHEN B. PERLMAN
ELEANOR D. ACHESON
Ropes & Gray
225 Franklin Street
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617-423-6100

May 21, 1975

United States District Court for the District of Massachusetts.

No. 75-1991-T.

[Title omitted in printing.]

Plaintiff's Application for a Temporary Restraining Order.

The plaintiff moves pursuant to 28 U.S.C. § 2284(3) that the Court enter a temporary restraining order:

A. Finding on the basis of paragraphs 16, 22, 33, 35, 37 and 38 of the Complaint, which is verified under oath by the plaintiff, that the plaintiff will, unless the defendants are temporarily restrained, suffer irreparable damage in that

(1) On March 28, 1975, the plaintiff was laid off from a permanent position in the Classified Civil Service of the Commonwealth of Massachusetts;

(2) The plaintiff is at present unemployed and desires to continue a twelve-year career in the public service of the Commonwealth;

(3) But for the operation of the Massachusetts Veterans' Preference Statute, Mass. G.L. c. 31, §§ 21-25, the plaintiff would rank third (rather than fourteenth) on an August 24, 1973 eligible list for a permanent position as head administrative assistant at the Solomon Mental Health Center in the Department of Mental Health of the Commonwealth and seventeenth (rather than seventieth) on an April, 1975 eligible list for permanent positions as administrative assistant in the Classified Civil Service of the Commonwealth; and

(4) Unless restrained the defendants will begin using the two foregoing eligible lists to make appointments to permanent positions or will permit the eligible list for head administrative assistant to expire thereby impairing the plaintiff's opportunity to be considered for a job;

and

B. Ordering that the defendants, their officers, agents, servants, employees, and attorneys, and all persons in active concert or participation with them, be temporarily restrained, until hearing and determination of this action by a three-judge court pursuant to 28 U.S.C. §§ 2281 and 2284, from any of the following actions:

(1) Making any appointment to any permanent position in the Classified Civil Service of the Commonwealth of Massachusetts from the April, 1975 eligible list for positions classified as administrative assistant, provided that this restraining order shall not prevent making appointments to temporary positions classified as administrative assistant from said list and provided further that any position classified as administrative assistant may be filled (or its present holder continued) on a provisional basis;

(2) Making any appointment to the permanent position of head administrative assistant at the Solomon Mental Health Center in the Department of Mental Health of the Commonwealth of Massachusetts, provided that said position may be filled (or its present holder continued) on a provisional basis; or

(3) Permitting the August 24, 1973 eligible list for the position of head administrative assistant at the Solomon

Mental Health Center in the Department of Mental Health of the Commonwealth of Massachusetts to expire.

By her attorneys,

RICHARD P. WARD
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May 22, 1975

United States District Court for the District of Massachusetts.

No. 75-1991-T.

[Title omitted in printing.]

Temporary Restraining Order.

This action came on for hearing on the plaintiff's application for a temporary restraining order before the Court, Honorable Joseph L. Tauro, District Judge, presiding, and after hearing the Court finds on the basis of paragraphs 16, 22, 33, 35, 37 and 38 of the Complaint, which is verified under oath by the plaintiff, that the plaintiff will, unless the defendants are temporarily restrained, suffer irreparable damage in that

(1) On March 28, 1975, the plaintiff was laid off from a permanent position in the Classified Civil Service of the Commonwealth of Massachusetts;

(2) The plaintiff is at present unemployed and desires to continue a twelve-year career in the public service of the Commonwealth;

(3) But for the operation of the Massachusetts Veterans' Preference Statute, Mass. G.L. c. 31, §§ 21-25, the plaintiff would rank third (rather than fourteenth) on an August 24, 1973 eligible list for a permanent position as head administrative assistant at the Solomon Mental Health Center in the Department of Mental Health of the Commonwealth and seventeenth (rather than seventieth) on an April, 1975 eligible list for

permanent positions as administrative assistant in the Classified Civil Service of the Commonwealth; and

(4) Unless restrained the defendants will begin using the two foregoing eligible lists to make appointments to permanent positions or will permit the eligible list for head administrative assistant to expire thereby impairing the plaintiff's opportunity to be considered for a job.

It is therefore ORDERED:

A. That the defendants, their officers, agents, servants, employees, and attorneys, and all persons in active concert or participation with them, be temporarily restrained, until hearing and determination of this action by a three-judge court pursuant to 28 U.S.C. §§ 2281 and 2284, from either of the following actions:

(1) Making or approving any appointment to any permanent position in the Classified Civil Service of the Commonwealth of Massachusetts from the April, 1975 eligible list for positions classified as administrative assistant, provided that this restraining order shall not prevent making appointments to temporary positions classified as administrative assistant from said list and provided further that any position classified as administrative assistant may be filled (or its present holder continued) on a provisional basis; or

(2) Making or approving any appointment to the permanent position of head administrative assistant at the Solomon Mental Health Center in the Department of Mental Health of the Commonwealth of Massachusetts, provided that said position may be filled (or its present holder continued) on a provisional basis.

B. That expiration of the August 24, 1973 eligible list for the position of head administrative assistant at the Solomon Mental Health Center in the Department of Mental Health of the Commonwealth of Massachusetts be extended by the defendants until further order of this Court.

Dated at Boston, Massachusetts this 23d of May, 1975.

JOSEPH L. TAURO,
United States District Judge.

**United States District Court
for the District of Massachusetts.**

Nos. 74-5061-T, 75-1991-T.

[Titles omitted in printing.]

Defendants' Motion to Dismiss.

Now come the defendants in the above-entitled consolidated actions and move as follows:

The Anthony Case

1. That the Court dismiss *Anthony et al. v. Commonwealth et al.* for want of subject matter jurisdiction, there being no case or controversy as is required by U.S. Const., Art. III, because the enactment by the General Court of c. 134, Acts of 1975 has rendered this action moot.

The Feeney Case

2. That the Court dismiss *Feeney v. Commonwealth et al.* in its entirety for failure to state a claim upon which relief can be granted, there being no allegations to support a claim of unlawful discrimination.

3. That the Court dismiss *Feeney v. Commonwealth et al.* as to the Commonwealth of Massachusetts for want of subject matter jurisdiction, the Commonwealth never having consented to suit, as is required by U.S. Const., Amend. XI.

The defendants further move that argument on the above grounds for dismissal be heard concurrently with the argument on the merits in the above-entitled consolidated actions

according to the schedule arranged by the parties and ordered by this Court on May 23, 1975.

By their Attorney,
ALAN K. POSNER
Assistant Attorney General

[Certificate of Service omitted in printing.]

**United States District Court
for the District of Massachusetts.**

No. 75-1991-T.

[Title omitted in printing.]

Order.

Pursuant to the authority and command of 28 U.S.C. § 2284, I hereby designate and assign the Honorable Levin H. Campbell, United States Court of Appeals for the First Circuit, and the Honorable Frank J. Murray, United States District Judge for the District of Massachusetts to sit with the Honorable Joseph L. Tauro, United States District Judge for the District of Massachusetts in the above-entitled cause, a three-judge district court being required by 28 U.S.C. § 2281.

FRANK M. COFFIN,
Chief Judge,
U.S. Court of Appeals for the First Circuit.

Dated: June 6, 1975

**United States District Court
for the District of Massachusetts.**

No. 75-1991-T.

[Title omitted in printing.]

Agreed Statement of Facts.

For purposes of this case only, the parties to the above-entitled case stipulate and agree as follows:

1. The Plaintiff, Helen B. Feeney, is a female, residing in the Commonwealth of Massachusetts (Commonwealth).

2. The Defendant Division of Civil Service (Division) is an executive and administrative department of the Commonwealth created under the provisions of Mass. G.L. c. 13, § 2, and by that same statute placed under the supervision and control of the Director of Civil Service (Director) and the Civil Service Commission (Commission). Said Division is charged with administering and enforcing the provisions of the Massachusetts Civil Service Law, Mass. G.L. c. 31.

3. The Defendant Edward W. Powers was the Director from August 14, 1973 through June 30, 1975 and as such was an officer of the Commonwealth and administrative and executive head of the Division.

4. The Defendants Nancy B. Beecher, Wayne A. Budd, Richard Linden, Richard J. Healy and John Donegan are members of the Commission, and together they comprise the Commission.

5. The Division, the Director and the Commission are charged by the law of the Commonwealth with the administration and enforcement of the Massachusetts Civil Service Law which sets forth the requirements and procedures to be

followed in filling vacancies in positions in the employ of the Commonwealth which positions are known as the Classified Civil Service. As part of these general duties, these Defendants are charged with enforcement of the Veterans' Preference Statute (Mass. G.L. c. 31, §§ 21-25) which is a part of the Massachusetts Civil Service Law. Approximately 60 percent of all positions in the employ of the Commonwealth are subject to the Massachusetts Civil Service Law. The remaining 40 percent of positions are exempt from the Massachusetts Civil Service Law.

6. The Classified Civil Service is divided into two Divisions known as the Classified Official Service and as the Classified Labor Service. All positions referred to herein are positions in the Classified Official Service. Approximately 90,000 employees of the Commonwealth and its municipalities are presently employed in positions in the Classified Official Service subject to the Massachusetts Civil Service Law. Over 100,000 appointments and promotions to positions in the Classified Official Service was made from Eligible Lists established by the Director in the ten year period from July 1, 1964 through June 30, 1974. In the fiscal year of the Commonwealth ended June 30, 1974, over 11,000 appointments (not including promotions) were made to positions in the Classified Official Service from Eligible Lists established by the Director.

7. Applicants for permanent positions governed by the Massachusetts Civil Service Law and the Civil Service Rules are required to take a competitive examination that is designed to separate qualified applicants from unqualified applicants and to measure the applicants' relative ability and fitness to perform the duties of the position for which the examination is given. Applicants who pass the examination are referred to as "eligibles" and are placed on an "Eligible List". An "unassembled" competitive examination is one on which the relative

grades of applicants are determined on the sole basis of the training and experience of the applicants. On all other competitive examinations the relative grades are determined by a formula which gives weight both to the results of a written examination and to the training and experience of the applicants. On either type of examination applicants receive appropriate credit for relevant experience acquired in the military service of the United States.

8. The Veterans' Preference Statute requires each Eligible List to be established by ranking "eligibles" in the following order: (1) disabled veterans in order of their respective grades on the examination; (2) veterans in order of their respective grades on the examination; (3) widows of veterans and widowed mothers of veterans in order of their respective grades on the examination; and (4) all other eligibles in order of their respective grades on the examination. These four classifications are hereinafter referred to as "Preference Categories".

9. Pursuant to Mass. G.L. c. 31 and regulations issued thereunder, each appointing authority of the Commonwealth complies with the following procedures in filling vacancies for permanent positions governed by the Massachusetts Civil Service Law. The appointing authority sends a requisition to the Director stating the number of positions to be filled. The Director then certifies eligibles to the appointing authority in the order of rank on the Eligible List. One of two procedures is followed in certification and appointment of eligibles. Under one procedure (hereinafter referred to as "Certification Procedure One"), the Director certifies the number of eligibles which bears the following relationship to the number of vacancies stated on the requisition:

<u>No. of Vacancies</u>	<u>No. Certified</u>
1	2 or 3
2	4
3	5
4	6
5	7

(Thereafter, seven names are certified for each multiple of five vacancies; for vacancies from one to four, inclusive, over a multiple of five, additional names according to the above table.)

The appointing authority is required to make any appointment from among those certified. Certification Procedure One was followed with respect to the Solomon Head Administrative Assistant Eligible List referred to in paragraph 12 hereof. Under the other procedure (hereinafter referred to as "Certification Procedure Two"), for the position or positions requisitioned by each appointing authority, the Director sends out Notices of Interview to a number of the highest ranking eligibles which is larger than that specified by the table above. Only eligibles who report for an interview and agree to accept the position or positions are considered to be interested therein. The appointing authority is required to make any appointment from the number of the highest ranking interested eligibles that is determined by the table above (*e.g.*, for two vacancies the appointing authority must appoint two of the four highest ranking eligibles who are considered to be interested in the position). Certification Procedure Two was being followed with respect to the Administrative Assistant Eligible List referred to in paragraph 16 hereof until the entry of the restraining order in this action on May 23, 1975. Certification

Procedure Two would have been followed with respect to the Counsel I Eligible List referred to in paragraph 18 hereof but for the entry of the restraining order in *Anthony, et al. v. Commonwealth, et al.*, Civil Action No. 74-5061-T (November 4, 1974, D. Mass.). An Eligible List remains in effect for a maximum of two years after it is established but expires in less than two years if and when there remains no eligible thereon available for appointment. In some cases, a new examination is given for a position during the two year effective period of the Eligible List for that position even though eligibles remain thereon who are available for appointment. When this occurs, a new Eligible List is established, and the remaining eligibles on the prior list are integrated into the new list in order of grade within each Preference Category. While an Eligible List is in effect, all certifications to appointing authorities and all appointments to the position or positions for which the examination has been given must be made from the Eligible List. Under either Certification Procedure One or Certification Procedure Two, those eligibles determined by the table above from which an appointing authority must make any appointment to a permanent position are referred to as the "eligibles certified for appointment". In all cases, all eligibles who are tied at a particular grade within a Preference Category have equal eligibility to be included among the eligibles certified for appointment (*e.g.*, under Certification Procedure One, if there were two positions and eligibles in the highest Preference Category with scores of 94, 94, 92, 90, 90, 88 and 84, five, rather than four, eligibles would be certified for appointment).

10. In January, 1973, Mrs. Feeney made an application for the competitive examination for appointment to one permanent position classified by the Division as Head Administrative Assistant (Dr. Harry C. Solomon Mental Health Center) (hereinafter referred to as "Solomon Head Administrative Assist-

ant"). A copy of the Notice of Examination is attached hereto as Exhibit 1. The weekly salary rate for this position, a grade 17, ranges from \$237.95 to \$300.05.

11. On February 24, 1973, a competitive examination for Solomon Head Administrative Assistant was held. Mrs. Feeney received a grade of 92.32, which was the third highest grade on the examination.

12. On August 24, 1973, in accordance with the procedures described in paragraphs 7, 8 and 9 hereof, the Director established an Eligible List for Solomon Head Administrative Assistant, a copy of which is attached hereto as Exhibit 2. The copy of the Eligible List attached as Exhibit 2 and all other Eligible Lists attached as exhibits are true copies of official records of the Division, and the data contained thereon may be taken to be what it purports to be (*e.g.*, the designation of those eligibles who were granted veteran status for purposes of the preference provided by the Veterans' Preference Statute). On each Eligible List attached hereto as an exhibit, a handwritten notation of the sex of each eligible has been added by the parties for the purpose of this action although such handwritten notation is not part of the official record of the Division. Attached hereto as Exhibit 3 is a list of the veterans appearing on Exhibit 2 setting forth for each veteran the date of discharge from military service and the branch of military service to the extent ascertainable from records of the Division.

13. On October 3, 1973, the Director certified eligibles for appointment to the appointing authority for the permanent position of Solomon Head Administrative Assistant, a copy of the certification is attached hereto as Exhibit 4. No appointment has yet been made to this position.

14. In February, 1974, Mrs. Feeney made an application for the competitive examination for permanent appointment to positions classified by the Division as Administrative Assist-

ant. Attached hereto as Exhibit 5 is a copy of the Notice of Examination for these positions.

15. On May 18, 1974, a competitive examination for Administrative Assistant was held. Mrs. Feeney received a grade of 87. Sixteen applicants received higher grades. Five other applicants received the same grade.

16. In April, 1975, in accordance with the procedures described in paragraphs 7, 8 and 9 hereof, the Director established an Eligible List for Administrative Assistant (the Administrative Assistant Eligible List), a copy of which is attached hereto as Exhibit 6. Attached hereto as Exhibit 7 is a revised copy of the Administrative Assistant Eligible List which reflects some adjustments in rank for veterans who were found, prior to May 13, 1975, to be eligible for status as disabled veterans. Attached hereto as Exhibit 8 is a list of the veterans appearing on Exhibit 7 setting forth for each veteran the date of discharge from the military service and the branch of the military service to the extent ascertainable from records of the Division.

17. As of May 13, 1975, there were requisitions from five appointing authorities for a total of seven permanent positions classified as Administrative Assistant to be filled from the Administrative Assistant Eligible List. On May 13, 1975, the Director sent out Notices of Interview for Administrative Assistant in the manner described as Certification Procedure Two in paragraph 9 hereof. As a result of the restraining order entered in this action on May 23, 1975, no appointments to permanent positions classified as Administrative Assistant have been made. There are presently 43 provisional appointees to permanent positions classified as Administrative Assistant. If these positions are filled on a permanent basis over the two year effective period of the Administrative Assistant Eligible List, these positions will be filled from eligibles

certified for appointment from the Administrative Assistant Eligible List.

18. Attached hereto as Exhibit 9 is an Eligible List for positions classified as Counsel I which was established by the Director on October 25, 1974, in accordance with the procedures described in paragraphs 7, 8 and 9 hereof. Attached hereto as Exhibit 10 is a list of the veterans appearing on Exhibit 9 setting forth for each veteran the date of discharge from the military service and the branch of the military service to the extent ascertainable from records of the Division. The unassembled competitive examination for Counsel I is an open and continuous examination, *i.e.*, new applications are continuously accepted and processed, and from time to time applicants are graded and those receiving passing grades are integrated into the Eligible List in order of respective grades within each of the Preference Categories referred to in paragraph 8 hereof. Attached hereto as Exhibit 11 is an additional list of persons who have passed the unassembled examination for Counsel I and have been integrated into the Counsel I Eligible List in the manner described in this paragraph. Kathryn Noonan, a female non-veteran, should also be on the Counsel I Eligible List with a grade of 94. As of November 6, 1974, there were requisitions from thirteen appointing authorities for a total of nineteen permanent positions classified as Counsel I to be filled from the Counsel I Eligible List.

19. Of the veterans who took the Administrative Assistant examination given on May 18, 1974, approximately 84 of 147, or 57 percent, were not put on the Eligible List. Of those 84 veterans declared ineligible, 46 failed the written test and 38 failed to qualify for other reasons. Of the persons who were not put on the Administrative Assistant Eligible List after taking the applicable examination, approximately 84 of 301, or 28 percent, were veterans. Of the 301 persons declared ineligible, approximately 166 failed the written test, 132 failed to

qualify for other reasons and 3 cannot be accounted for. Of the veterans who took the Head Administrative Assistant examination given on February 24, 1973, 7 of 16, or 44 percent, were not put on the eligible list. Of those 7 veterans declared ineligible, 4 failed the written test and 3 failed to qualify for other reasons. Of the persons who were not put on the Eligible List for Head Administrative Assistant after taking the applicable examination, approximately 7 of 16, or 44 percent, were veterans. Of the 16 persons declared ineligible, 11 failed the written test and 5 failed to qualify for other reasons.

20. During the period from July 1, 1963 through June 30, 1973, 47,005 appointments (not including promotions) to permanent positions in the Classified Official Service were made by appointing authorities of the Commonwealth and its municipalities. Forty-three percent, or 20,211, of these appointments were females (of whom 374, or 1.8 percent, were veterans). Fifty-seven percent, or 26,794, of these appointments were males (of whom 14,476, or 54 percent, were veterans). Attached hereto as Exhibit 12 is a table setting forth for the fiscal years of the Commonwealth from 1964 through 1973 inclusive the numbers of persons appointed to permanent positions in the Classified Official Service, and a breakdown by sex of the number who were disabled veterans, veterans, "Gold Star" widows and widowed mothers of veterans and non-veterans for the purpose of application of the Veterans' Preference Statute. For many positions there has not been competition between male and female applicants. A large percentage of the female appointees in permanent positions are in the lower grade and lower paying positions, such as clerical positions, for which males have traditionally not applied. Some of the female appointees were appointed as a result of the practice by some appointing authorities of requisitioning specifically for a female eligible (a practice which is no longer permitted and was discontinued about 1971 when

the Massachusetts Civil Service Law, which had expressly permitted such practice, was amended). Some of the female eligibles were appointed from lists which did not include many veterans. Some female eligibles were appointed from lists on which they were not included in the initial certifications because of veterans' preference but were reached for certification later during the two year effective period of the list as additional jobs were requisitioned from the same list. A greater proportion of the male appointees than female appointees in permanent positions are in the higher grade and higher paying positions. For many permanent positions for which males and females have competed, the application of the Veterans' Preference Statute has resulted in a substantially greater proportion of female eligibles than male eligibles not being certified to appointing authorities for appointment to permanent positions. Attached hereto as Exhibits 13 through 62 are fifty examples of eligible lists on which female eligibles are ranked below male veterans with lower grades and from which lists eligibles, who were not certified for appointment, would have been certified if rankings on the eligible lists had been made solely on the basis of grades on the competitive examinations. These examples are not intended to be exhaustive and the parties have not determined how many such examples there are. There have been many thousands of eligible lists established during the past ten years. Attached hereto as Exhibit 63 is the Annual Report to the Great and General Court of the Commonwealth and the Governor from the Massachusetts Civil Service Commission and the Director of Civil Service for the fiscal year ended June 30, 1974.

21. Attached hereto as Exhibits 64 through 79 are true copies of some notices of civil service examinations, principally for Counsel positions and Administrative Assistant positions, published by the Director pursuant to which examinations

were held, eligible lists were established and certifications for appointment to permanent positions were made.

22. Alfonso M. D'Apuzzo, a male, was originally examined on January 14, 1961, for the position of Assistant Attorney, Labor Relations Committee, Department of Labor Industries. His examination was given and an Eligible List established pursuant to Exhibit 71. He received the appointment to the job described above and has since been promoted to the position of Executive Secretary, State Labor Relations Commission.

23. Robert F. Troy, a male, was originally examined on January 28, 1961, for the position of General Counsel, Division of Administration, Department of Public Health. His examination was given and an Eligible List established pursuant to Exhibit 70. He received the appointment to the position described above and has since been promoted to the position of Chief Attorney of the Division of Administration, Department of Public Health.

24. Joseph A. O'Neill, a male, was originally examined on September 23, 1961 for the temporary position of Administrative Assistant, Division of Local Health Services, Department of Public Health. His examination was given and an Eligible List established pursuant to Exhibit 68. He received the appointment to the position described above and was subsequently appointed permanently from the same Eligible List, a copy of which is attached hereto as Exhibit 80.

25. Margaret M. Higgins, a female, has been an employee of the Commonwealth at the State Labor Relations Commission since October 27, 1937. She is presently employed in the position classified as Hearing Stenographer, a grade 13 position. The weekly salary range for Hearing Stenographer, grade 13, is \$185.05 to \$226.45. Margaret M. Higgins took the examination for the permanent position classified as Labor Relations Examiner held on December 10, 1966, and her name

was placed on the Eligible List established by the Director on June 12, 1967, a copy of which is attached hereto as Exhibit 81. The last three appointments to the permanent positions of Labor Relations Examiner were made from Exhibit 81. Ms. Higgins was not certified for appointment. The present weekly salary range for the permanent position of Labor Relations Examiner is \$250.95 to \$318.15.

26. In addition to Counsel I, there are three additional Counsel categories in the Commonwealth designated as Counsel II, Counsel III and Counsel IV. Counsel III and Counsel IV positions are generally filled by promotion from within the service; Counsel I and Counsel II are both entry level positions. As of March 7, 1975, 20 Counsel positions were filled by permanent employees as follows:

Counsel	I	1
Counsel	II	10
Counsel	III	7
Counsel	IV	2

Of the 20 Counsel positions filled by permanent employees all 20 are filled by males, of whom 17 are veterans. No non-veteran holds a permanent appointment to a Counsel I position. All 20 of the Counsel positions filled by permanent employees were filled pursuant to the Massachusetts Civil Service Law including the Veterans' Preference Statute.

27. Mrs. Feeney took the examination held on February 6, 1971 for one permanent position classified as Assistant Secretary, Board of Dental Examiners. She received the second highest grade of 86.68. She was ranked sixth on the Eligible List behind five male veterans of whom four received lower grades. Mrs. Feeney was not certified for appointment. A male veteran with a grade of 78.08 was certified and ap-

pointed. A copy of the Eligible List for Assistant Secretary, established in accordance with the procedures described in paragraphs 7, 8 and 9 hereof, is attached hereto as Exhibit 61.

28. Mrs. Feeney is not a veteran. She has never applied for admission to any branch of the armed services of the United States.

29. If the plaintiff, Helen B. Feeney, were present in Court, she would testify under oath as set forth in her affidavit attached hereto as Exhibit 82.

30. If Edward W. Powers were present in Court, he would testify under oath as set forth in his affidavit attached hereto as Exhibit 83.

31. There are approximately 868,000 veterans who reside in the Commonwealth of whom approximately 16,000 are female. As of 1970 there were approximately 2,719,000 males in the Commonwealth of whom approximately 1,823,00 were over 18 years of age. As of 1970 there were approximately 2,970,000 females in the Commonwealth of whom approximately 1,990,000 were over the age of 18.

32. During the past ten years, approximately 56 percent of all male applicants who passed civil service examinations for positions in the Classified Official Service were disabled veterans or veterans who received the preference for disabled veterans and veterans provided by the Veterans' Preference Statute. During the past ten years, approximately 1.5 percent of the female applicants who passed civil service examinations for positions in the Classified Official Service were disabled veterans or veterans who received the preference for disabled veterans and veterans provided by the Veterans' Preference Statute. Attached hereto as Exhibit 84 is a table setting forth for the fiscal years of the Commonwealth from 1964 through 1973 inclusive the numbers of persons passing civil service examinations for positions in the Classified Official Service and a breakdown by sex of the number who were disabled veterans,

veterans, "Gold Star" widows and widowed mothers of veterans and non-veterans for the purpose of application of the Veterans' Preference Statute.

33. As of December 10, 1974, there were a total of approximately 15,589 members of the Bar of the Commonwealth of whom 979 were female.

34. Listed below for each year 1970-1974 are the total number of persons admitted to the bar in that year and the number of females included in that total.

<u>Year</u>	<u>Total No. of Persons</u>	
	<u>Admitted to Bar</u>	<u>Females Admitted to Bar</u>
1970	682	48
1971	814	75
1972	959	98
1973	1,134	124
1974	1,320	167

35. No woman other than a nurse was admitted into any branch of the armed services of the United States until August 12, 1918, when approximately 10,000 women were enlisted into the Navy and Marine Corps as "Yeomanettes" and "Marinettes". The Army determined that it was legally disabled from enlisting women at this time. These organizations were disbanded on July 30, 1919. No women other than nurses were enlisted in the armed services after that date until 1942 when the Women's Army Auxiliary Corps (WAAC) and the Navy WAVES were created on May 14, 1942, and July 30, 1942, respectively. On February 13, 1943, the Women's Marine Corps was created, and on July 1, 1943, the Women's Army Corps was created.

36. Women have never been permitted admission to the United States Military Academy at West Point, the United

States Naval Academy, or the United States Air Force Academy. Admission to these institutions has been and is restricted to men.

37. No woman has ever been drafted into service with any of the armed services. Draftees have been limited to males.

38. At all times relevant to these proceedings until within the past five years, the armed services prohibited the enlistment and appointment of married women, women with children less than 18 years of age, and women between the ages of 18 and 21 who did not have parental consent. Similarly situated men were not so limited.

39. The military occupational classifications (MOS) system is designed to identify, classify, and relate skills and personality characteristics to military job requirements. According to a Yale Law Journal Note, "The Equal Rights Amendment and the Military," 82 Yale L.J. 1533, as of July, 1972, medical and dental specialties and administrative personnel accounted for the occupational specialties of 94.6 percent of the enlisted women in the Army. Similarly, women were excluded as of July, 1972 from more than half of the Army officer MOS. The total number of officer MOS in the Army in July, 1972 was 365. Of the 188 from which women were excluded, 81 were medical officer MOS, 35 were male command MOS, 49 involved railroad, marine, or aviation operations, and 23 others involved physical labor or assignment to a combat or hazardous duty area. As a result, 46 percent of the women serving as Army officers were in the field of administration and personnel, while another 14.3 percent were in positions commanding other women. One of the MOS from which women were excluded was Post Commander. Women commanded organized WAC units consisting of approximately 100 women. Groups of less than 50 women at a station were called WAC contingents and were administered and commanded by men.

40. Attached hereto as Exhibit 90 is a true copy of testimony before the Special Subcommittee on Utilization of Manpower in the Military, Committee on Armed Services, U.S. House of Representatives, at the hearing session of March 6, 1972.

41. Attached hereto as Exhibit 91 is a true copy of a publication entitled "Selected Manpower Statistics", issued by the United States Department of Defense on May 15, 1974. The facts set forth therein may be taken by the court to be true.

42. Attached hereto as Exhibit 92 are true copies of publications entitled "The View From Here" and published by the Office of the Director, Women's Army Corps, United States Army. The facts stated therein may be taken by the Court to be true and the opinions stated therein may be taken by the Court to be those of the Director of the Women's Army Corps.

43. Attached as Exhibit 92 is a true copy of a publication entitled "Utilization of Military Women", issued by the Department of Defense in December, 1972. The facts set forth therein may be taken by the Court to be true.

44. Attached hereto as Exhibit 94 are a group of charts setting forth data concerning the military services, which data may be taken by the Court to be true.

45. Attached hereto as Exhibit 95 are true copies of Fact Sheets setting forth facts concerning the United States Army, which information may be taken by the Court to be true.

46. Attached hereto as Exhibit 96 is a true copy of excerpts of AR 601-100, entitled "Appointment of Commissioned and Warrant Officers in the Regular Army", as currently in effect.

47. Attached hereto as Exhibit 97 is a true copy of excerpts of AR 601-100 as in effect until October 29, 1974.

48. Attached hereto as Exhibit 98 is a true copy of excerpts of AR 601-100 as in effect until November 15, 1971.

49. Attached hereto as Exhibit 99 is a true copy of excerpts of AR 135-100, entitled "Army National Guard and Army Re-

serve, Appointment of Commissioned and Warrant Officers of the Army", as currently in effect.

50. Attached hereto as Exhibit 100 is a true copy of excerpts of AR 601-210, entitled "Regular Army Enlistment Program", as currently in effect.

51. Attached hereto as Exhibit 101 is a true copy of excerpts of AR 601-210 as in effect until January 14, 1975.

52. Attached hereto as Exhibit 102 is a true copy of excerpts of AR 601-210 as in effect during 1973.

53. Attached hereto as Exhibit 103 is a true copy of excerpts of AR 601-210 as in effect until May 1, 1968.

54. Attached hereto as Exhibit 104 is a true copy of excerpts of AR 601-210 as in effect until September 16, 1964.

55. Attached hereto as Exhibit 105 is a true copy of excerpts of AR 601-280, entitled "Army Reenlistment Program", as currently in effect.

56. Attached hereto as Exhibit 106 is a true copy of excerpts of AR 601-280 as in effect until November 30, 1973.

57. Attached hereto as Exhibit 107 is a true copy of excerpts of AR 351-5, entitled "Army Officer Candidate Schools", as currently in effect.

58. Attached hereto as Exhibit 108 is a true copy of excerpts of AR 351-5 as in effect until January 23, 1975.

59. Attached hereto as Exhibit 109 is a true copy of excerpts of AR 351-5 as in effect until March 3, 1971.

60. Attached hereto as Exhibit 110 is a true copy of excerpts of AR 350-50, predecessor to AR 351-5, as in effect until January 31, 1969.

61. Attached hereto as Exhibit 111 is a true copy of excerpts of AR 611-201, entitled "Enlisted Career Management Fields and Military Occupational Specialties" as currently in effect.

62. Attached hereto as Exhibit 112 is a true copy of excerpts of AR 611-201 as in effect until October 1, 1973.

63. Attached hereto as Exhibit 113 is a true copy of excerpts of AR 611-201 as in effect until April 24, 1973.

64. Attached hereto as Exhibit 114 is a true copy of excerpts of AR 611-201 as in effect until October 26, 1972.

65. Attached hereto as Exhibit 115 is a true copy of excerpts of AR 611-201 as in effect until January 5, 1967.

66. Attached hereto as Exhibit 116 is a true copy of excerpts of AR 360-5, entitled "General Policies", as currently in effect.

67. Attached hereto as Exhibit 117 is a true copy of excerpts of AR 360-3, entitled "Women's Army Corps — General Provisions", as currently in effect.

68. Attached hereto as Exhibit 118 is a true copy of excerpts of AR 600-105, entitled "Army Aviation Officer Career Program", as currently in effect.

69. Attached hereto as Exhibit 119 is a true copy of excerpts of AR 600-20, entitled "Army Command Policy and Procedure", as currently in effect.

70. Attached hereto as Exhibit 120 is a true copy of excerpts of AR 614-30, entitled "Assignments, Details and Transfers, Oversea Service", as currently in effect.

71. Attached hereto as Exhibit 121 is a true copy of excerpts of AR 614-100, entitled "Assignments, Details and Transfers, Officers", as currently in effect.

72. Attached hereto as Exhibit 122 is a true copy of excerpts of AR 624-100, entitled "Promotion of Officers on Active Duty", as currently in effect.

73. Attached hereto as Exhibit 123 is a true copy of excerpts of AR 140-111, entitled "Army Reserve, Enlistment and Reenlistment", as currently in effect.

74. Attached hereto as Exhibit 124 is a true copy of excerpts of AR 135-178, entitled "Separation of Enlisted Personnel" as currently in effect.

75. Attached hereto as Exhibit 125 is a true copy of excerpts of AR 135-178 as in effect until December 30, 1969.

76. Attached hereto as Exhibit 126 is a true copy of excerpts of AR 135-178 as in effect until June 12, 1968.

77. Attached hereto as Exhibit 127 is a true copy of excerpts of AR 135-178 as in effect until January 20, 1966.

78. Attached hereto as Exhibit 128 is a true copy of excerpts of AR 635-130, entitled "Retirement of Officers, as in effect until August 8, 1960.

79. Attached hereto as Exhibit 129 is a true copy of excerpts of AR 635-130 as in effect until February, 1969.

80. Attached hereto as Exhibit 130 is a true copy of excerpts of AR 635-200, entitled "Personnel Separations, Enlisted Personnel", as currently in effect.

81. Attached hereto as Exhibit 131 is a true copy of excerpts of AR 635-200, which was in effect on or about October 13, 1971.

82. Attached hereto as Exhibit 132 is a true copy of excerpts of AR 635-200, as in effect on or about July 15, 1966.

83. Attached hereto as Exhibit 133 is a true copy of excerpts of AR 635-200 as in effect on or about June 21, 1972.

84. Attached hereto as Exhibit 134 is a true copy of excerpts of AR 635-200 as in effect on or about August 6, 1971.

85. Attached hereto as Exhibit 135 is a true copy of excerpts of AR 635-200 as in effect on or about April 16, 1971.

86. Attached hereto as Exhibit 136 is a true copy of excerpts of AR 635-200 as in effect on or about November 4, 1970.

87. Attached hereto as Exhibit 137 is a true copy of excerpts of AR 635-200 as in effect on or about April 25, 1969.

88. Attached hereto as Exhibit 138 is a true copy of excerpts of AR 635-200 as in effect on or about July 15, 1966.

89. Attached hereto as Exhibit 139 is a true copy of excerpts of AR 635-200 as in effect on or about August 6, 1974.

90. Attached hereto as Exhibit 140 is a true copy of excerpts of AR 635-200 as in effect on or about June 21, 1972.

91. Attached hereto as Exhibit 141 is a true copy of excerpts of AR 635-200 as in effect on or about August 6, 1974.

92. Attached hereto as Exhibit 142 is a true copy of excerpts of AR 635-200 as in effect on or about April 3, 1970.

93. Attached hereto as Exhibit 143 is a true copy of excerpts of AR 635-200 as in effect on or about May 21, 1969.

94. Attached hereto as Exhibit 144 is a true copy of excerpts of AR 635-120, entitled "Personnel Separations, Resignations and Discharges", as in effect on or about June 9, 1972.

95. Attached hereto as Exhibit 145 is a true copy of excerpts of AR 635-120 as in effect on or about April 8, 1969.

96. Attached hereto as Exhibit 146 is a true copy of excerpts of AR 635-120 as in effect on or about October 5, 1962.

97. Attached hereto as Exhibit 147 is a true copy of excerpts of AR 635-120 as in effect on or about May 21, 1962.

98. Attached hereto as Exhibit 148 is a true copy of excerpts of AR 635-120 as in effect on or about November 25, 1955.

99. Attached hereto as Exhibit 149 is a true copy of excerpts of AR 635-120 as in effect on or about April 16, 1971.

100. Attached hereto as Exhibit 150 is a true copy of excerpts of AR 635-120 as in effect on or about April 8, 1968.

101. Attached hereto as Exhibit 151 is a true copy of excerpts of AR 635-120 as in effect on or about May 21, 1962.

102. Attached hereto as Exhibit 152 is a true copy of excerpts of AR 635-120 as in effect on or about November 25, 1955 and until approximately May 21, 1962.

103. Attached hereto as Exhibit 153 are excerpts from the deposition of Lieutenant Colonel James W. Ward, United States Air Force, taken December 12, 1972 in the case of *Christina Callahan v. Melvin Laird*, Case No. CA 71-500-M, United States District Court for the District of Massachusetts. Colonel Ward's testimony may be taken by the Court to be true.

104. Attached hereto as Exhibit 154 is a true copy of a letter dated July 15, 1974 from Colonel Michael J. Barrett, Jr. to Mr. Jeffrey Axelrod. The statements therein may be taken by the Court to be true.

105. Attached hereto as Exhibit 155 is a true copy of excerpts of Air Force ("AF") Manual 33-3 entitled "Enlistment in the Regular Air Force" as in effect approximately between the dates April 15, 1970 and May 4, 1972.

106. Attached hereto as Exhibit 156 is a true copy of excerpts of Air Force Regulation ("AFR") No. 36-5 entitled "Appointment of Officers in the Regular Air Force" as in effect on or about July 10, 1969.

107. Attached hereto as Exhibit 157 is a true copy of excerpts of AFR 30-12(C3) entitled "Administrative Separation of Commissioned Officers and Warrant Officers and Warrant Officers of the Air Force" as in effect on or about May 1, 1970.

108. Attached hereto as Exhibit 158 is a true copy of excerpts of AF Manual 39-10 entitled "Separation Upon Expiration of Term of Service, for Convenience of Government, Minority, Dependency, and Hardship" as in effect on or about May 18, 1972.

109. Attached hereto as Exhibit 159 is a true copy of excerpts of Bureau of Naval Personnel Manual ("BUPERS"), No. 1070100 entitled "Dependency Status and Pregnancy Status for Women" as in effect on or about October, 1974.

110. Attached hereto as Exhibit 160 is a true copy of excerpts of BUPERS No. 3810170 entitled "Separation of Women with Dependency or Pregnancy Status" and of BUPERS No. 3810180 entitled "Maternity Care Available before and after Separation" as in effect sometime on or about January, 1975.

111. Attached hereto as Exhibit 161 is a true copy of excerpts of BUPERS No. 3850220 entitled "Separation of En-

listed Personnel for Convenience of the Government" as in effect on or about October, 1974.

112. Attached hereto as Exhibit 162 is a true copy of excerpts of SECNAV Instruction 1920.6 as promulgated on or about July 14, 1971.

113. Attached hereto as Exhibit 163 is a true copy of excerpts of Marine Corps Separation and Retirement Manual Part B entitled "Women Officers" as in effect on or about July 4, 1970.

114. Attached hereto as Exhibit 164 is a true copy of excerpts of Marine Corps Separation and Retirement Manual § 6012 entitled "Discharge or Release from Active Duty for Convenience of the Government".

115. Attached hereto as Exhibit 165 is a true copy of excerpts of Marine Corps Military Personnel Procurement Manual as in effect on or about March 15, 1974.

116. Attached hereto as Exhibit 166 is a true copy of excerpts of Marine Corps Military Personnel Procurement Manual Part C entitled "Women Marines — Enlistment and Reenlistment — Marine Corps — Marine Corps Reserves".

117. Attached hereto as Exhibit 167 is a true copy of excerpts of Marine Corps Order 1900.1H as promulgated on or about June 30, 1970.

118. Attached hereto as Exhibit 168 is a true copy of excerpts of the Report of the United States Army Ad Hoc General Officer Steering Committee on Equal Opportunity, released on July 10, 1975 and approved by the Secretary of

the Army. The statements therein may be taken by the Court to be true.

THE PLAINTIFF

By her attorneys,

RICHARD P. WARD
JOHN SILAS HOPKINS, III
STEPHEN B. PERLMAN
ELEANOR D. ACHESON
Ropes & Gray
225 Franklin Street
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JOHN REINSTEIN
100 Franklin Street
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July 17, 1975

THE DEFENDANTS

By their attorney,

FRANCIS X. BELLOTTI
S. STEPHEN ROSENFELD
ALAN K. POSNER
Assistant Attorneys General
State House
Boston, Massachusetts

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EXHIBIT 1.

FEBRUARY 24, 1973

APPLICATIONS MUST BE RECEIVED IN THE OFFICE OF THE
DIVISION OF CIVIL SERVICE NOT LATER THAN MONDAY,
FEBRUARY 5, 1973

HEAD ADMINISTRATIVE ASSISTANT
(DR. HARRY C. SOLOMON MENTAL HEALTH CENTER)
STATE DEPARTMENT OF MENTAL HEALTH

SALARY: The minimum salary is \$216.90 a week; the maximum salary is \$273.60 a week.

ENTRANCE REQUIREMENTS: Applicants must have at least five years of full-time, or equivalent part-time, paid experience in an administrative or professional capacity in office work

SUBSTITUTIONS:

(1) A bachelor's degree from a recognized school with a major in public or business administration, or government may be substituted for two years of the required experience. (2) A graduate degree from a recognized school with a major in public or business administration, or government may be substituted for two years of the required experience.

Wherever possession of a degree by an applicant is needed in order that he may qualify for entrance to an examination, current enrollment in the last year of study toward the degree, or completion of all the requirements for a degree, will be ac-

cepted as meeting such need. Any applicant so enrolled or who has completed all the requirements for the degree, and who is otherwise qualified, will be considered eligible to apply for the examination. The name of any such applicant will not be placed on the eligible list, however, until proof of his possession of the degree or a copy of an official letter from a college stating that he has completed all the required work for a degree and will receive the degree on a specified date is presented to the Division of Civil Service.

SUBJECTS AND WEIGHTS: Training and experience, 2; practical questions, 3; total, 5.

PHYSICAL FITNESS: To be determined by physical examination.

DUTIES: Under supervision, to give direct assistance in the administrative development of service programs for this first comprehensive community mental health center of the Department of Mental Health; to provide administrative assistance in the area of community clinical expertise; to plan and execute administrative practices and policies; to perform initial ground work in identifying issues and problems thereby assisting the Superintendent in reaching definitive formulation of the steps to take in the establishment of each of the Service programs.

Examples of duties: Planning, setting up and reviewing exchanges of service between Center and private or public agencies; developing administrative arrangements and procedures for working with programs (Drug abuse prevention, Rehabilitation, Alcohol abuse prevention, etc.); coordinating activities of the clinical disciplines and their relations with private and public agencies in the Mental Health Area; conducting overview of the Center's operation based on data reflecting service being rendered by personnel, in order to assign priorities in accordance with demands; being responsible for maintenance of center handbook of operational guidelines in an up-to-date

condition; developing preliminary proposal for area annual plan with Associate Area Director; assisting in preparation of annual preliminary budget proposal and in preparation of final annual budget request; being responsible for Center's Public Relation activities.

The following are required: Knowledge of service program administration such as knowledge of how to evaluate the service needs of mental illness in its many categories, knowledge of the particular skills of the several mental health professional disciplines, knowledge of the contributions community resources can make to restore patients to community life, and knowledge of how to develop organizational structures and procedures that will coordinate professional and community resources to form workable service programs (Some of these programs are education, consultation, prevention, early treatment, after-care and rehabilitation); extensive knowledge of office practices and procedures including office record keeping and appliances; extensive knowledge of the principles of office management and the ability to apply this knowledge to supervisory problems; thorough knowledge of the principles and practices of public and business administration; thorough knowledge of the functions, organizations and laws and regulations governing the agency involved; considerable knowledge of accounting principles and practices; ability to plan, organize and supervise the work of subordinates performing a variety of office functions; ability to develop effective office work procedures and policies; ability to understand and follow complex oral and written instructions; ability to exercise judgment and discretion in applying and interpreting departmental policies and procedures; ability to prepare operating and statistical reports; ability to establish and maintain harmonious working relationships with other employees and the public.

EQUAL EMPLOYMENT OPPORTUNITY EMPLOYER

GENERAL INFORMATION.

Applications may be obtained by applying in person or by letter at the office of the Division of Civil Service, 294 Washington Street, Boston, or from any of the following Civil Service Representatives: Attleboro, Clara Smith; Brockton, Anna Lundquist; Chicopee, Frank Lonczak; Fall River, Ronald J. Lowenstein; Fitchburg, Ruth G. Warrell; Gloucester, Alice F. Fall; Greenfield, Richard H. Howard; Haverhill, Dorothy I. Kelley; Holyoke, Frances T. Hendrickson; Lawrence, Mary F. Gillen; Lowell, Harold F. Winn; Marlborough, Marguerite Bushey; New Bedford, Rosella N. Beauparland; North Adams, Dosalea B. Rhodes; Northampton, David P. Sullivan; Pittsfield, Lawrence A. Grizey, Jr.; Springfield, Ellen V. Cannon; Taunton, Catherine Kerwick; Worcester, Eugene Gardiner. When filled out, the application should be filed at once in the office of the Division of Civil Service, 294 Washington Street, Boston, 02108.

Notice of the time and place of examination, together with a Training and Experience Sheet and any necessary instruction, will be sent to those having applications on file within the required time. **IMPORTANT:** The Training and Experience Sheet must be presented on the day of examination. Experience is marked on the basis of a predetermined schedule for the type of work set forth above and every candidate is marked by the same schedule. The Civil Service Law provides that in the grading of the subject of Training and Experience in any competitive examination, no credit shall be allowed, either in the original marking of the examination, upon review of the original marking by the Director or by the Civil Service Commission, whether upon an appeal from the decision of the Di-

rector or otherwise for any training and employment or experience not fully stated in the training and experience sheet filed at the time of examination.

Each applicant will be notified of the results of his examination within sixty days after the examination has been held. If the results are available earlier, all applicants will be notified.

The names of veterans and widows of veterans and of widowed mothers of veterans who pass the examination and who meet the requirements of General Laws, Chapter 31, Section 23 will be placed upon the eligible list in order of their respective standings above the names of other applicants as provided in that section.

No specimen questions are available.

The Division of Civil Service has no connection with any school offering special instructions by correspondence or otherwise in preparation for civil service examinations. The Division is in no way responsible for any statement contained in the advertisement of any such school.

MABEL A. CAMPBELL, Director of Civil Service

EXHIBIT 2.

Eligible List.

ESTABLISHED BY DIRECTOR OF CIVIL SERVICE

August 24, 1973

Head Adim Assistant

Men Hlth (Dr HCS Men H C)

Examination Held 02/24/73

7 Women — 25 Men Examined

4 Women — 12 Men Eligible

1. Irvin Joseph F. D.V.
77 Hamilton Street Malden
77.40 73-05171 11/17/25 T P Y Y 08/24/73
2. Mangay, Edward P. Vet.
34 Belrose Avenue Lowell
93.28 73-01921 07/06/29 T P Y Y 08/24/73
3. Rodney, Harold Vet.
87 Barouche Drive Marshfield
90.20 73-05924 11/26/32 T P Y Y 08/24/73
4. Ellerton, Robert J. Vet.
8 Hamilton Road Brookline
89.04 73-04960 05/28/45 T P Y Y 08/24/73
5. Spain, Francis J. Vet.
11 Gilwood Road Medford
88.00 73-01920 03/22/21 T P Y Y 08/24/73
6. Makarewicz, Francis E. Vet.
1501 Gorham Street Lowell
86.04 73-04318 11/02/32 T P Y Y 08/24/73
7. Goode, Francis J. Vet.
4 Longspur Road Chelmsford
82.60 73-03325 04/20/28 T P Y Y 08/24/73

8. Cagney, Maurice J. Vet.
10 Garfield Avenue Beverly
82.16 73-05190 07/15/36 T P Y Y 08/24/73
9. Malloy, John G. Vet.
292 Pine Street Fall River
78.24 73-03834 11/13/32 T P Y Y 08/24/73
10. Semrod, Theodore L.
311 South Street Carlisle
94.88 73-05484 03/29/38 T P Y Y 08/24/73
11. Feeney, Helen B.
1826 Lakeview Ave. Dracut
92.32 73-05477 12/09/21 T P Y Y 08/24/73
12. White, Joan C.
7 Alden Avenue Hull
88.63 73-05715 10/08/30 T P Y Y 08/24/73
13. Belinsky, Ruth
109 Wentworth Ave. Lowell
84.12 73-02082 10/01/23 T P Y Y 08/24/73
14. Milot, Edmund B.
10½ Waverly St. Taunton
83.92 73-02386 05/26/46 T P Y Y 08/24/73
15. Chipman, Elizabeth A.
63 Edgewood Road Wayland
82.92 73-04137 03/20/32 T P Y Y 08/24/73
16. Weinberg, John R.
158 Second Street Newton
86.32 73-05196 10/29/45 T P Y Y 08/24/73

No. Denoting Rank on List	Name of Veteran	Discharge Date	Military Branch
1	Irvin, Joseph F.	no application in file	
2	Mangan, E. P.	1948	Navy
3	Rooney, Harold	no military info in file	
4	Ellertsen, Robert J.	1968	Navy
5	Swain, Francis J.	February 1946	Army
6	Makarewicz, F. E.	Feb. 2, 1955	Army
7	Goode, F. J.	no military info in file	
8	Cagney, M. J.	no military info in file	
9	Malloy, John	no military info in file	

DIVISION OF CIVIL SERVICE

CERTIFICATION AND REPORT FORM

DR WILLIAM GOLDMAN, COMM
MENTAL HEALTH
190 PORTLAND STREET
BOSTON, MASSACHUSETTS

COPY TO: DR JOHN SANBOURNE BOCKOVEN, SUPT
ONE PERM HEAD ADMINISTRATIVE ASST @ \$224.05 WK

City or Town.....STATE.....

Department....**RENTAL..HEALTH.....**

• Division SCLOHON..MENTAL..HEALTH

Date.....D.....OCTOBER....3, 1973.

15 12 35 14 24 401784-17-01

LOCATION: LOWELL

Below is a list of eligibles in order of standings who have been notified to report to you for an interview. *Report of those certified and selected must be made of 1 of the first 3 highest on the list who signify their willingness to accept. *Report of those certified and the action of the appointing authority should be made forthwith in the space provided. Notice of selection of appointment should be forwarded to DIVISION OF CIVIL SERVICE IN QUADRUPLICATE on Form 14. An appointing authority may examine, if still on file, applications, certificates, examination papers, employment records and stated court records of persons certified, and interview them thereon.

[illegible]

E.V.C.
C-10/24/73

Edward W. Brown
(Mrs.) MABEL A. CAMPBELL, Director of Civil Service

This certification is void if not acted upon within two weeks from its date unless extension is requested and approved.

If extension of authorization of this list requested for an additional two weeks check the reason below:

Inability to make selection within authorized period

Insufficient number of applicants willing to accept and request is made for additional names

If notification of employment not attached, state when it will be forwarded.

Notification of employment attached

*PLEASE REFER TO REVERSE SIDE OF FORM FOR FURTHER INSTRUCTIONS ON CIVIL SERVICE LAW

at two weeks check the reason below:

is it ready for additional names.

Forwarded by _____

(Officer authorized by law to make appointment)

Title Asst Director of Bureau of Personnel Management

EXHIBIT 5.

ADMINISTRATIVE ASSISTANT
STATE SERVICE

This examination is held to establish an eligible list to be used to fill vacancies in this classification in all State departments and institutions.

SALARY: The minimum salary is \$185.20 a week; the maximum is \$230.80 a week.

ENTRANCE REQUIREMENTS: Applicants must have at least two years of full-time, or equivalent part-time, paid administrative, managerial or professional experience in the field of office or business administration in work the major duties of which included one or more of the following functions: purchasing, personnel administration, budgetary control and/or accounting.

SUBSTITUTIONS:

(1) A bachelor's or a higher degree from a recognized degree-granting school with a major in personnel, accounting, or public or business administration may be substituted for the required experience. (2) A bachelor's degree from a recognized degree-granting school with a major other than in personnel, accounting, or public or business administration may be substituted for one year of the required experience.

Whenever possession of a degree by an applicant is needed in order to qualify for entrance to an examination, current enrollment in the last year of study toward the degree, or com-

pletion of all the requirements for a degree, will be accepted as meeting such need. Any applicant so enrolled or who has completed all the requirements for the degree, and who is otherwise qualified, will be considered eligible to apply for the examination. The name of any such applicant will not be placed on the eligible list, however, until proof of possession of the degree or a copy of an official letter from a college stating that applicant completed all the required work for a degree and will receive the degree on a specified date is presented to the Division of Civil Service.

SUBJECTS AND WEIGHTS: Training and experience, 2; practical questions, 3; total, 5.

PHYSICAL FITNESS: To be determined by physical examination.

DUTIES: Under the general supervision of an executive or administrative employee of higher grade who reviews work for conformance with departmental policies, to assist in the administration of a State department or institution by performing administrative duties that require a high degree of decision for conformance with departmental regulations and policies; to exercise working supervision over a small number of office employees in the performance of assigned duties; and to perform related work as required.

Examples of duties: (Note: The following examples apply only in reference to general duties performed but not necessarily applicable to all state department requiring services of an administrative assistant.) Assisting in the planning and execution of all matters pertaining to a major phase of the business management or administrative program of a large department or institution and recommending policies designed to meet administrative requirements and to deal effectively with operating needs; planning and supervising administration in a small department, including departmental expenditures and the preparation of payrolls, purchase orders, and

personnel records and reports, payroll disbursement, fiscal and accounting operations, authorizations for payment for materials, services and supplies; advising on administrative problems, acting as liaison with other departments, and consulting as necessary with agencies outside the State government; preparing administrative and fiscal reports and statistical analyses; preparing and following up budget requests; assisting in the preparation of budgets and financial reports; interviewing applicants for various non-professional positions of lower grade, and filling vacancies in accordance with Civil Service Rules and Regulations, performing miscellaneous administrative functions such as the supervision of office maintenance and the purchasing of equipment and supplies; when necessary, developing and carrying out training programs for new employees, teaching basic principles of the work to be performed, reviewing completed assignments, and assisting and advising wherever necessary.

The following are required: Thorough knowledge of the principles and techniques of office and administrative management, including office practices and procedures; thorough knowledge of office record keeping and appliances; considerable knowledge of the principles and practices of public and business administration; following appointment, ability to acquire considerable knowledge of the functions, organizations, and laws and regulations governing the agency involved; ability to plan, organize, and supervise the work of subordinates performing a variety of office functions; ability to develop effective office work procedures; ability to understand and follow complex oral or written instructions; ability to exercise judgment and discretion in applying and interpreting departmental policies and procedures; ability to prepare operating and statistical reports; ability to establish and maintain harmonious relationships with other employees and the public.

NOTE: The Director of Civil Service may deem the results of this examination to be suitable for use in filling requisitions for positions which are similar in duties, responsibilities and qualifications.

EXAMINATION CENTERS AND CODE NUMBERS TO BE
USED ON THE APPLICATION CARD OR CIVIL
SERVICE EXAMINATION (FORM) ARE LISTED
ON THE OTHER SIDE OF THIS
EXAMINATION ANNOUNCEMENT.

GENERAL INFORMATION

Application cards (Form 1) may be obtained by applying in person or by letter at the office of the Division of Civil Service, 294 Washington Street, Boston, or from any of the following Civil Service Representatives: Attleboro, Clara Smith; Brockton, Anna Lundquist; Chicopee, Frank Lonczak; Fall River, Ronald J. Lowenstein; Fitchburg, Ruth G. Warrell; Gloucester, Alice F. Fall; Greenfield, Richard H. Howard; Haverhill, Dorothy I. Kelley; Holyoke, Frances T. Hendrickson; Lawrence, Joseph Smith, City Clerk; Lowell, Joseph F. Dowd; Marlborough, Marguerite Bushey; New Bedford, Rosella N. Beauparland; North Adams, Dosalea B. Rhodes; Northampton, David P. Sullivan; Pittsfield, Lawrence A. Grizey, Jr.; Springfield, Ellen V. Cannon; Taunton, Catherine Kervick; Worcester, Eugene Gardiner. When filled out, the application card should be filed at once in the office of the Division of Civil Service, 294 Washington Street, Boston, 02108.

Notice of the time and place of examination, together with an application form (Form 1E), a Training and Experience Sheet and any necessary instruction, will be sent to those hav-

ing applications on file within the required time. **IMPORTANT:** The Training and Experience Sheet must be presented on the day of examination. Experience is marked on the basis of a predetermined schedule for the type of work set forth above and every candidate is marked by the same schedule. The Civil Service Law provides that in the grading of the subject of Training and Experience in any competitive examination, no credit shall be allowed, either in the original marking of the examination, upon review of the original marking by the Director or by the Civil Service Commission, whether upon an appeal from the decision of the Director or otherwise for any training and employment or experience not fully stated in the training and experience sheet filed at the time of examination.

Each applicant will be notified of the results of examination.

The names of veterans, of certain widows of veterans and of certain widowed mothers of veterans (see G.L. c. 31, § 23B), who pass the examination and who meet the requirements of General Laws, Chapter 31, Section 23 will be placed upon the eligible list in order of their respective standings above the names of other applicants as provided in Section 23.

No specimen questions are available.

The Division of Civil Service has no connection with any school offering special instructions by correspondence or otherwise in preparation for civil service examination. The Division is in no way responsible for any statement contained in the advertisement of any such school.

Edward W. Powers, Director of Civil Service.

EQUAL OPPORTUNITY EMPLOYERS

EXHIBIT 6.

DIVISION OF CIVIL SERVICE

Eligible List

ESTABLISHED BY DIRECTOR OF CIVIL SERVICE

April , 1975

Administrative Assistant

State Service

EXAMINATION HELD 05/18/74

169 Women 295 Men Examined

27 Women 136 Men Eligible

1. Malloy, Charles H. 567 Winthrop Street	D.V. 88.00 74-43227 Medford	05/07/18 TP Y
2. Linehan, Leo M. MCDA400 Worcester Rd.	Vet. 94.00 74-20810	11/15/26 OP N

3. Finn Jr., Henry L.
664 Shaker Road
4. Lynch, Kalman J.
99 Reservation Road
5. Brown, Maurice C.
12 Isabell Circle
6. Kelly, Thomas F.
7 Valentine Road
7. Morse, Robert W.
22 Liberty Street
8. Natola, Generoso J.
77 Trenton Street
9. Collins, James R.
180 Main St. A6108
10. Smith, Albert W.
38 Spring Pk Ave. Air
11. Stundze, Ronald F.
91 Regal Street
12. Gundelman, Morton, N.
31 1/4 Englewood Ave

Vet.	92.00	74-36774	02/04/16	TP	Y
Longmeadow					
Vet.	92.00	74-32168	10/19/18	OP	N
Andover					
Vet.	90.00	74-42472	05/20/13	OP	N
Randolph					
Vet.	90.00	74-43966	11/05/22	OP	N
Arlington					
Vet.	90.00	74-43992	02/27/17	OP	N
Beverly					
Vet.	89.00	74-24176	02/14/18	OP	N
East Boston					
Vet.	88.00	74-25504	08/24/25	OP	N
Bridgewater					
Vet.	88.00	74-21210	12/22/46	OP	N
Boston					
Vet.	88.00	74-39356	07/29/33	TP	Y
Whitman					
Vet.	87.00	74-39889	11/16/22	TP	Y
Brookline					

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13. Swain, Francis J.
4 Wildwood Road
14. Casella, Natal J.
4 Traymore Street
15. Incrovato, James D.
5 Lexington Avenue
16. Rooney, Harold H.
67 Barouche Drive
17. Rowland, Joseph M.
12 Aberdeen Street
18. Callagy, Thomas A.
46 Foster Street
19. Harrington, Joseph P.
101 Ashland Street
20. Kerig, John A.
184 West Street
21. Murphy, Jeremiah V.
34 Old Barnstable Rd.
22. Vito, Henry J.
63 Norfolk Street

Vet.	87.00	74-38027	03/22/21	TP	N
Medford					
Vet.	86.00	74-24500	01/29/15	TP	Y
Cambridge					
Vet.	86.00	74-34831	04/14/33	TP	Y
East Boston					
Vet.	86.00	74-39132	11/26/32	TP	Y
Marshfield					
Vet.	86.00	74-25442	07/25/45	TP	N
Boston					
Vet.	85.00	74-37660	01/21/20	OP	N
North Andover					
Vet.	85.00	74-37043	09/05/18	TP	Y
Malden					
Vet.	85.00	74-33317	05/10/18	TP	Y
Osterville					
Vet.	85.00	74-36064	12/03/24	OP	N
E. Falmouth					
Vet.	85.00	74-27974	05/01/28	TP	Y
Worcester					

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23. Higgins, Richard D.
P.O. Box 264
24. Kessler, Simon M.
262 Shirley Street
25. Slamin, Joseph W.
38 Marlton Road
26. Campbell, Eugene J.
81-A Norwood Avenue
27. Cawley Jr. Joseph P.
86 Kenwood Street
28. Hartwell, Ivan G.
21 Little Bay Lane
29. McCarney, Thomas J.
475 Weld Street
30. Armstrong Jr. Albert E.
135 Winthrop St. A-24
31. King, Albert W.
110 Lyman Road
32. Latremouille, Robert J.
67 Highland Ave. A2

Vet. 84.00	74-36919	12/22/19	TP	N
Peabody				
Vet. 84.00	74-23800	08/23/18	TP	Y
Winthrop				
Vet. 84.00	74-36068	01/01/31	TP	N
Waltham				
Vet. 83.00	74-43994	02/17/31	TP	N
Newton Center				
Vet. 83.00	74-14395	10/28/47	OP	N
Dorchester				
Vet. 83.00	74-30636	05/17/33	TP	Y
Buzzards Bay				
Vet. 83.00	74-26037	09/22/40	TP	N
West Roxbury				
Vet. 82.00	74-22673	07/11/44	TP	Y
Framingham				
Vet. 82.00	74-43411	12/05/20	OP	N
Milton				
Vet. 82.00	74-36290	11/16/42	TP	Y
Cambridge				

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33. Grublin, Alex R.
22 Rita Road
34. Hurley, John P.
54 Parkman Street
35. Jaeger, Robert C.
404 Massachusetts Ave.
36. Kovacs, Henry E.
2 Prospect Street
37. Leavy, Gerald B.
182 Linden Street
38. Cagney, Maurice J.
10 Garfield Avenue
39. Gilday, John A.
28 Castle Street
40. Hogan, Harry V.
41 Poulos Road
41. Martorano, Nicholas B.
2 Orris Place
42. O'Leary, John T.
30 Auburn Street

Vet. 81.00	74-38024	12/08/17	TB	Y
Dorchester				
Vet. 81.00	74-24580	07/23/45	TP	N
Dorchester				
Vet. 81.00	74-41129	01/15/46	TP	N
Arlington				
Vet. 81.00	74-42278	03/10/21	OP	N
Williamstown				
Vet. 81.00	74-38781	08/08/45	TP	N
Everett				
Vet. 80.00	74-32677	07/15/36	TP	N
Beverly				
Vet. 80.00	74-33041	04/26/45	OP	N
Springfield				
Vet. 80.00	74-42881	04/09/32	OP	N
Braintree				
Vet. 80.00	74-43688	12/09/44	TP	Y
Melrose				
Vet. 80.00	74-26148	08/20/34	TP	N
Malden				

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43. Prager, Bruce R.
575 Broad St. A114
44. Sherman, May F.
353 Elm St. Apt. 302
45. Sullivan, Richard J.
6 Mt. Vernon Street
46. O'Donnell, Dennis M.
105 Warren Avenue
47. Philbrick, Bruce H.
53 O'Dell Avenue
48. Recko, William R.
34 Evergreen Road
49. Ernst, David R.
125 Lovell Road
50. Leacock, William R.
80X675 Fed. Station
51. Murstein, Irving
10 Copeland Street
52. Scull Jr. Edward T.
38 Jay Street

Vet. 80.00	74-32687	12/27/47	OP	N
Weymouth				
Vet. 80.00	74-30175	03/17/26	TP	Y
Lawrence				
Vet. 80.00	74-23806	03/28/46	TP	Y
Saugus				
Vet. 79.00	74-43114	06/08/40	TP	N
Chelmsford				
Vet. 79.00	74-37045	12/05/49	TP	N
Beverly				
Vet. 79.00	74-21807	03/10/33	TP	N
Stoneham				
Vet. 78.00	74-32831	01/08/45	TP	N
Watertown				
Vet. 78.00	74-35424	08/26/20	TP	N
Worcester				
Vet. 78.00	74-30025	09/03/33	TP	Y
Quincy				
Vet. 78.00	74-23201	12/13/44	OP	N
Somerville				

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53. Collins, William J.
23 Prospect Avenue
54. Demeritt, Roger S.
P.O. Box 531
55. Hart, Robert E.
21 Windom Street
56. Kelly, John P.
104 1-2 Wash. St. A-2
57. Philbrick, Donald M.
53 ODell Avenue
58. Drever, Robert I.
91 Crest Avenue
59. Codinha, Paul P.
6 Beacon Blvd.
60. Crisafulli, Anthony F.
351 Engamore Lane
61. Phillips, Edward A.
289 Fifth Street
62. Ruddy, Richard A.
496 Mill Street

Vet. 77.00	74-43665	12/28/48	TP	N
Rosindale				
Vet. 77.00	74-40370	12/17/44	TP	N
Newburyport				
Vet. 77.00	74-21846	01/11/47	TP	N
Somerville				
Vet. 77.00	74-29592	12/13/46	TP	N
Ayer				
Vet. 76.00	74-29794	09/03/46	OP	N
Beverly				
Vet. 75.00	74-32821	06/18/20	OP	N
Chelsea				
Vet. 74.00	74-28586	06/07/39	OP	N
Peabody				
Vet. 74.00	74-27393	11/12/43	OP	N
Norwood				
Vet. 74.00	74-42493	07/08/39	TP	N
Fall River				
Vet. 73.00	74-42984	02/16/47	OP	N
Worcester				

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63. Seroll, William G. 29 Wilson Park	Vet. 73.00	74-20781	12/07/47	OP	N
64. McCarthy, Joseph M. 25 Old Pasture Road	92.00	74-34350	04/25/23	TP	Y
65. Vericella, John R. 210 Summer Street	91.00	74-37040	08/21/29	TP	Y
66. Budreski, Francis A. 20 Adin Drive	90.00	74-23257	05/06/29	OP	N
67. Clancy, Dorothea C. 20 Maple Street	89.00	74-30437	12/17/26	TP	Y
68. Fitzgerald, Joan 46 Irving Street	88.00	74-46457	05/10/46	TP	Y
69. Barrette, Richard T. 8 Wesley St. Apt. 3	87.00	74-42381	03/18/38	TP	N
70. Feeney, Helen B. 1826 Lakeview Avenue	87.00	74-20808	12/09/21	TP	Y
71. Hagan, N. Stephen 1 Adrienne Drive	87.00	74-36062	07/29/40	TP	N
72. Howes, Alan G. 67 Millstone Road	87.00	74-34043	05/11/09	OP	N

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73. Robert Jr. Hubert E. 570 Bay Road	86.00	74-29928	06/25/49	TP	Y
74. Thompson, Luke E. 62 Clark Street	86.00	74-43856	09/05/48	TP	N
75. Buchanan, Marie G. 845 Columbia Road	85.00	74-42211	12/28/22	TP	Y
76. Thomas, Barbara A. 780 Boylston St. A-4D	85.00	74-27944	02/04/29	OP	N
77. Gallery, Walter F. 11 Harrington Avenue	84.00	74-40366	04/11/47	TP	N
78. O'Loughlin, Lucinda E. 12 Buck Street	84.00	74-43953	04/09/44	OP	N
79. Reagan, Patrick W. 23 North Lane	84.00	74-43145	06/12/50	TP	N
80. Thrasher, Sara L. 122 Warren St. A12	84.00	74-26712	01/10/45	TP	Y
81. Wiot, Frank C. 314 Highland Avenue	84.00	74-36596	07/13/31	TP	N
82. Brombier, Marshall 1 Canton Road Apt 2	83.00	74-41127	02/22/43	TP	N

121

83. Coffey, William F. 3 Haskell Street	83.00 74-32130 07/15/49 OP N	Norton
84. Crouse, Nancy E. 42 Clewley Road	83.00 74-39012 03/14/42 TP Y	Medford
85. Deren, Gloria J. 130 Bowdoin St. A1106	83.00 74-42977 05/09/50 OP N	Boston
86. Donovan, John T. 15 Sherman Road	83.00 74-34829 10/20/35 TP Y	Dedham
87. Keough, Paul G. 24 Glenellen Road	83.00 74-24420 07/21/52 TP Y	West Roxbury
88. Lynch, Frederick E. 132 Magazine Street	83.00 74-26208 12/24/41 OP N	Cambridge
89. O'Brien, Marnette S. 122 Babcock Street	83.00 74-25865 11/06/34 TP N	Brookline
90. Brandies, Paul S. 23 Lanark Road	82.00 74-26160 12/17/49 OP NN	Brighton
91. Cogen, Bernice E. 17 Ruck Glen Circle	82.00 74-37309 12/27/17 TP NN	Medford
92. Guttwald, John F. 8 Fairlawn Avenue	82.00 74-42775 01/23/50 TP NN	Mattapan

122

93. Russo, Ronald J. 64 Marlboro Street	82.00 74-21209 12/06/42 TP YY	Belmont
94. Rolger, Jeffery S. 570 North Main St.	81.00 74-20804 02/22/50 TP YY	Randolph
95. Dube, Peter C. 350 Acrebrook Drive	81.00 74-35150 04/27/49 TP NN	Florence
96. Heining, Thomas H. 227 Chapman Street	81.00 74-39570 03/30/37 TP YY	Greenfield
97. Kaufman, Judith A. 41 Ridgemont Street	81.00 74-40579 12/24/46 TP NN	Brighton
98. McManus, Michael T. 74 Francis Street	81.00 74-39010 09/03/46 TP NN	Boston
99. Naughton, Thomas J. 137 Bridge Street	81.00 74-35328 03/14/48 OP NN	Newton
100. O'Hearn, Barbara P.O. Box 178	81.00 74-43147 07/15/23 TP NN	Pittsfield
101. Saller, Edward G. 21 Evergreen Ave. 13B	81.00 74-27138 11/04/47 OP NN	Hartford
102. Short Jr. William D. 193 High Street	81.00 74-39887 05/29/48 OP NN	Greenfield

123

103. Sonnenberg, Margaret W. 25 Curtis Street	81.00 74-33706	10/27/14	OP	NN
104. Thompson, Joan P. 47 Summer St. Apt. 4	81.00 74-27447	09/13/32	TP	YY
105. Carbine, David J. 430 Main Street	80.00 74-30650	05/02/44	TP	YY
106. Duhigg, Michael F. 46 Pine Point Road	80.00 74-25341	12/20/43	TP	NN
107. Facchetti, Edward 48 Carey Road	80.00 74-38907	06/05/50	OP	NN
108. Levites, Alan G. 13 Gloucester Street	80.00 74-39083	11/14/44	OP	NN
109. Offutt, Timothy L. 19 17 W. Baltimore St.	80.00 74-26180	05/28/49	TP	NN
110. Phelan, Joseph E. P.O. Box 419	80.00 74-31031	09/24/48	TP	YY
111. Rapo, Paul S. 31 Goddard Street	80.00 74-42982	04/09/48	TP	YY
112. Sleison, William L. 160 Clark Street	80.00 74-31241	04/24/51	TP	NN

124

113. St. Cyr Jr. Lawrence M. 453 Patterson Hse.	80.00 74-29217	02/10/52	TP	NN
114. Thompson, Kathryn E. 12 Agawam Road	80.00 74-27119	03/20/19	TP	YY
115. Boyadjian, James A. 68 Morningside Drive	79.00 74-34744	02/16/48	TP	YY
116. Cusick, Ursula 43 Cushing Street	79.00 74-43998	05/09/17	TP	YY
117. Hines, Patrick J. 88 Cherry Street	79.00 74-29749	08/23/50	TP	YY
118. Lewicki, Mitchell F. 777 Lagrange Street	79.00 74-24187	06/03/47	TP	NN
119. Picardo, Steven A. 195 Sheridan Avenue	79.00 74-26653	02/08/49	TP	NN
120. Ruderman, Bruce M. 45 Sheridan Dr. A12	79.00 74-24947	12/19/49	TP	NN
121. Shanahan, Eunice P. 6 North Ames Street	79.00 74-30556	12/29/19	OP	NN
122. Hertz, George K. 30 Allston St. Apt. 35	78.00 74-42242	06/18/46	TP	NN

125

123. Koblinsky, Joseph P. 43 Acton Street	78.00	74-32487	08/02/48	TP	NN
124. Skerry Jr. Richard A. 110 Washington St.	78.00	74-36291	05/14/51	TP	NN
125. Smith, Gisele L. 15 Raleigh Road	78.00	74-36067	02/04/24	TP	NN
126. Boncoddio, Gerard J. 54 Selwyn Road	77.00	74-27907	04/03/52	TP	NN
127. Borrero, Joan 25 Lorraine Terrace	77.00	74-37586	08/06/37	TP	YY
128. Curley, Gertrude A. 373 Main Street	77.00	74-44024	09/24/21	TP	YY
129. Donovan, Marion F. 952 East Broadway	77.00	74-27451	02/18/32	TP	NN
130. Gallagher, George M. 10 Vesey Road	77.00	74-38323	04/01/40	TP	NN
131. Hartnett Jr, Leo M. 13 Sharon Avenue	77.00	74-42727	12/09/52	TP	NN
132. Lettich, Mark R. 24 Sunset Road	77.00	74-41408	07/19/51	OP	NN

126

133. Loatham, Barbara S. 15 Fenwick Place	77.00	74-26194	09/21/33	TP	YY
134. Loda, Peter W. 106 Revere Street	77.00	74-38789	04/05/49	OP	NN
135. Pysz, Paul E. 200 Kelton Street A5	77.00	74-35049	09/06/50	TP	NN
136. Wholey, James J. 14 Shadow Drive	77.00	74-41130	07/30/52	TP	
137. Carabetta, Michael R. 128 Elm Street	76.00	74-35048	05/23/49	OP	
138. Connolly, David H. 63 Summer Street	76.00	74-28217	10/07/46	TP	
139. Fursythe, Jeffrey P. 644 Adams Street	76.00	74-40145	02/28/51	OP	
140. Hirshberg, Robert M. 25 Brighton Ave. A3	76.00	74-39564	10/30/48	TP	
141. Johnson, Chester G. 116 So. Main Street	76.00	74-39018	06/07/47	TP	
142. Kerivan, Rita M. 75 Pilgrim Road	76.00	74-34042	12/20/19	TP	

127

143. Waldman, James T.
40 Monastery Road
144. Day, William A.
78 Lake Shore Drive
145. Frazier, Grant T.
57 Garfield Avenue
146. Jamilkowski, Michael L.
15 Peckham Street
147. Kelley Jr. Francis M.
66 William Street
148. Lotti, John J.
102 Sachem Street
149. Halley, Kevin H.
476 Beacon Street
150. Orr, Daniel J.
34 Lindenwood Road
151. Scaglione Jr. Peter T.
16 Clancy Street
152. Tomlinson, David P.
218 Lakeshore Dr. A3

76.00	74-33368	07/28/50	TP
Brighton			
75.00	74-43097	11/24/49	TP
Dracut			
75.00	74-24815	05/16/47	OP
Weymouth			
75.00	74-28252	04/17/48	OP
New Bedford			
75.00	74-30929	10/30/47	TP
Walpole			
75.00	74-44021	01/09/45	TP
Wollaston			
75.00	74-42352	06/25/49	TP
Boston			
75.00	74-21386	11/05/46	OP
Stoneham			
75.00	74-43820	07/28/46	OP
Chelmsford			
75.00	74-43412	02/16/43	OP
Brighton			

128

153. Decker, John F.
35 Woodland Road
154. Mazzaferro, Linda A.
62 Castle Road
155. O'Malley, William F.
44 Humphreys Street
156. Reardon, Joseph J.
23 Partridge Avenue
157. Ruggiero, Wayne A.
37 Poole Street
158. McClure, John S.
20 Spalding Street
159. Milano, Arthur H.
10 California Park
160. Zazopoulos, Andrew A.
5 Downing Avenue
161. Lutz, Dale A.
62 Carey Ave. Apt. 4
162. Neild, Roger B.
39 Myrtle Street

74.00	74-38018	06/15/43	TP
Holden			
74.00	74-38664	07/06/49	OP
Nahant			
74.00	74-34675	03/13/44	TP
Dorchester			
74.00	74-35668	02/09/41	TP
Somerville			
74.00	74-33705	01/27/53	TP
Medford			
73.00	74-43222	03/10/49	TP
Jamaica Plain			
73.00	74-47690	02/16/39	OP NN
Watertown			
73.00	74-20737	10/14/50	TP YY
Haverhill			
72.00	74-27392	09/14/49	TP YY
Watertown			
72.00	74-43659	11/16/49	TP YY
Everett			

129

163. Rosenberg, Ellen B.
44 Atherton Road

72.00 74-38019 11/01/52 TP NN
Brookline

END OF REPORT

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131

SUPPLEMENTARY SHEET

Administrative Assistant, State Service

Exam. Held 5.18.74 Elig. Date 5.13.75

- 1 — McCrann, Eunice R. 74-29751 Civ. 75.00
6 Laban Pratt Rd.
Neponset
4.24.75 Comm. voted to accept experience as meeting entrance requirements

5.16.75 Placed on elig. list bd

EXHIBIT 7.

June 25, 1973

Administrative Asst.

1. Malloy, Charles, H. 567 Winthrop Street	D.V. 88.00 74-43227	03/07/18	TP YY
2. Incrovato, James D. 5 Lexington Avenue	D.V. 86.00 74-34831	04/14/33	TP Y
3. Rowland, Joseph M. 12 Aberdeen Street	D.V. 86.00 74-25442	07/25/45	TP N
4. Higgins, Richard D. P.O. Box 264	D.V. 84.00 74-36919	12/22/19	TP N
5. Linehan, Leo M. MCDA400 Worcester Rd.	Vet. 94.00 74-20810	11/15/26	OP N
6. Finn Jr., Henry L. 664 Shaker Road	Vet. 92.00 74-36774	02/04/16	TP Y
7. Lynch, Kalman J. 99 Reservation Road	Longmeadow Vet. 92.00 74-32168	10/19/18	OP N
8. McCarthy, Joseph H. 25 Old Pasture Road	Andover Vet. 92.00 74-34350	04/25/23	TP YY
	Cohasset		

132

9. Brown, Maurice C. 12 Isabell Circle	Vet. 90.00 74-42472	05/20/13	OP NN
10. Kelly, Thomas F. 7 Valentine Road	Randolph Vet. 90.00 74-43966	10/05/33	OP NN
11. Morse, Robert W. 22 Liberty Street	Arlington Vet. 90.00 74-43992	02/27/17	OP NN
12. Natola, Generoso J. 77 Trenton Street	Beverly Vet. 89.00 74-24176	02/14/18	OP NN
13. Collins, James R. 180 Main St. A6108	East Boston Vet. 88.00 74-25504	08/24/25	OP NN
14. Smith, Albert W. 38 Spring Pk Av A1R	Bridgewater Vet. 88.00 74-21210	12/22/46	OP NN
15. Stundze, Ronald F. 91 Regal Street	Boston Vet. 88.00 74-39356	07/29/33	TP YY
16. Gondelman, Morton N. 31 1/2 Englewood Ave	Whitman Vet. 87.00 74-39889	11/16/22	TP YY
17. Swain, Francis J. 4 Wildwood Road	Brookline Vet. 87.00 74-38027	03/22/21	TP NN
Casella, Natal J. 4 Trayhore Street	Medford Vet. 86.00 74-24500	01/29/13	TP YY
	Cambridge		

133

19. Rooney, Harold H.
67 Barouche Drive
20. Callagy, Thomas A.
46 Foster Street
21. Harrington, Joseph P.
101 Ashland Street
22. Kerig, John A.
184 West Street
23. Murphy, Jeremiah V.
34 Old Barnstable Rd
24. Vito, Henry J.
63 Norfolk Street
25. Kessler, Simon H.
262 Shirley Street
26. Slamin, Joseph W.
38 Marlton Road
27. Campbell, Eugene J.
81-A Norwbid Avenue
28. Cawley Jr, Joseph P.
86 Kenwood Street

Vet. 86.00 74-39132 11/26/32 TP YY
Marshfield
Vet. 85.00 74-37663 01/21/20 OP NN
North Andover
Vet. 85.00 74-37043 09/05/13 TP YY
Malden
Vet. 85.00 74-33317 05/10/18 TP YY
Osterville
Vet. 83.00 74-36064 12/03/24 OP NN
E. Falmouth
Vet. 85.00 74-27974 05/01/28 TP YY
Worcester
Vet. 84.00 74-23800 08/23/18 TP YY
Winthrop
Vet. 84.00 74-36068 01/01/31 TP NN
Waltham
Vet. 83.00 74-43994 02/17/31 TP NN
Newton Center
Vet. 83.00 74-14395 10/28/47 OP NN
Dorchester

29. Hartnell, Ivan G.
21 Little Bay Lane
30. McCarney, Thomas J.
475 Weld Street
31. Armstrong Jr, Albert E.
135 Winthrop St. A-24
32. King, Albert W.
110 Lyman Road
33. Latremouille, Robert J.
67 Highland Ave. A2
34. Grublin, Alex R.
22 Rita Road
35. Hurley, John P.
54 Parkman Street
36. Jaeger, Robert C.
404 Massachusetts Ave
37. Kovacs, Henry E.
2 Prospect Street
38. Leavy, Gerald B.
182 Linden Street

Vet. 83.00 74-30636 05/17/33 TP YY
Buzzards Bay
Vet. 83.00 74-26037 09/22/40 TP NN
West Roxbury
Vet. 82.00 74-22673 07/11/44 TP YY
Framingham
Vet. 82.00 74-43411 12/05/20 OP NN
Milton
Vet. 82.00 74-36290 11/16/42 TP YY
Cambridge
Vet. 81.00 74-38024 12/08/17 TP YY
Dorchester
Vet. 81.00 74-24580 07/23/45 TP NN
Dorchester
Vet. 81.00 74-41129 01/15/45 TP NN
Arlington
Vet. 81.00 74-42278 03/10/21 OP NN
Williamstown
Vet. 81.00 74-38781 08/08/45 TP NN
Everett

39. Cagney, Maurice J.
10 Garfield Avenue
40. Gilday, John A.
28 Castle Street
41. Hogan, Harry V.
41 Poulos Road
42. Martorano, Nicholas B.
2 Orris Place
43. Oleary, John T.
30 Auburn Street
44. Prager, Bruce R.
575 Broad St. A114
45. Sherman, May F.
353 Elm St. Apt. 302
46. Sullivan, Richard J.
6 Mt. Vernon Street
47. O'Donnell, Dennis M.
105 Warren Avenue
48. Philbrick, Bruce H.
53 Odell Avenue

Vet. 80.00 74-32677 07/15/36 TP NN
Beverly
Vet. 80.00 74-33041 04/26/45 OP NN
Springfield
Vet. 80.00 74-42881 04/09/32 OP NN
Braintree
Vet. 80.00 74-43688 12/09/44 TP YY
Melrose
Vet. 80.00 74-26148 08/20/34 TP NN
Malden
Vet. 80.00 74-32687 12/27/47 OP NN
Weymouth
Vet. 80.00 74-30175 03/17/20 TP YY
Lawrence
Vet. 80.00 74-23806 03/28/46 TP YY
Saugus
Vet. 79.00 74-43114 06/08/40 TP NN
Chelmsford
Vet. 79.00 74-37045 12/05/49 TP NN
Beverly

136

49. Recko, William R.
34 Evergreen Road
50. Ernst, David R.
125 Lovell Road
51. Leacock, William R.
Box 675 Fed. Station
52. Murstein, Irving
10 Copeland Street
53. Scull Jr, Edward T.
38 Jay Street
54. Collins, William J.
23 Prospect Avenue
55. Demeritt, Roger S.
P.O. Box 531
56. Hart, Robert E.
21 Windom Street
57. Kelly, John P.
104 1-2 Wash. St. A-2
58. Philbrick, Donald M.
53 Odell Avenue

Vet. 79.00 74-21807 03/10/33 TP NN
Stoneham
Vet. 78.00 74-32831 01/08/45 TP NN
Watertown
Vet. 78.00 74-35424 08/26/20 TP NN
Worcester
Vet. 78.00 74-30025 09/03/33 TP YY
Quincy
Vet. 78.00 74-23201 12/13/44 OP NN
Somerville
Vet. 77.00 74-43665 12/23/48 TP NN
Roslindale
Vet. 77.00 74-40370 12/17/44 TP NN
Newburyport
Vet. 77.00 74-21846 01/11/47 TP NN
Somerville
Vet. 77.00 74-29592 12/13/46 TP NN
Ayer
Vet. 76.00 74-29794 09/03/46 OP NN
Beverly

137

59. Drever, Robert I.
91 Crest Avenue
60. Codinha, Paul P.
6 Beacon Blvd.
61. Crisafulli, Anthony F.
351 Engamore Lane
62. Phillips, Edward A.
289 Fifth Street
63. Ruddy, Richard A.
496 Mill Street
64. Seroll, William G.
29 Wilson Park
65. Vericella, Joan R.
210 Summer Street
66. Budreski, Francis A.
20 Adin Drive
67. Clancy, Dorothea C.
20 Maple Street
68. Fitzgerald, Joan
46 Irving Street

Vet. 75.00 74-32821 06/18/20 OP NN
Chelsea
Vet. 74.00 74-28586 06/07/39 OP NN
Peabody
Vet. 74.00 74-27393 11/12/43 OP NN
Norwood
Vet. 74.00 74-42493 07/08/39 TP NN
Fall River
Vet. 73.00 74-42984 02/16/47 OP NN
Worcester
Vet. 73.00 74-20781 12/07/47 OP NN
Brighton
91.00 74-37040 08/21/29 TP YY
Haverhill
90.00 74-23257 03/06/29 OP NN
Concord
89.00 74-30437 12/17/26 TP YY
West Roxbury
88.00 74-46457 03/10/46 TP YY
Cambridge

138

69. Barrette, Richard T.
8 Wesley St. Apt. 3
70. Feeney, Helen B.
1826 Lakeview Avenue
71. Hagan, N. Stephen
1 Adrienne Drive
72. Howes, Alan G.
67 Millstone Road
73. Robert Jr., Hubert E.
570 Bay Road
74. Thompson, Luke E.
62 Clark Street
75. Buchanan, Marie G.
845 Columbia Road
76. Kusek, Helena M.
118 Walnut Street
77. Thomas, Barbara A.
780 Boylston St. A-4D
78. Gallery, Walter F.
11 Harrington Avenue

87.00 74-42381 03/18/38 TP NN
Newton
87.00 74-20808 12/09/21 TP YY
Dracut
87.00 74-36062 07/29/40 TP NN
Canton
87.00 74-34043 05/11/09 OP NN
Hyde Park
86.00 74-29928 06/25/49 TP YY
Amherst
86.00 74-43836 09/05/48 TP NN
Worcester
85.00 74-42211 12/28/22 TP YY
Dorchester
85.00 74-27055 10/18/19 TP YY
Holyoke
85.00 74-27944 02/04/29 OP NN
Boston
84.00 74-40366 04/11/47 TP NN
Quincy

139

79. Hernon, Mildred M.
82 Kemper Street

80. O'Loughlin, Lucinda E.
12 Buck Street

81. Reagan, Patrick W.
23 North Lane

82. Thrasher, Sara L.
122 Warren St. Apt. 12

83. Widt, Frank C.
314 Highland Avenue

84. Allen, Esther A.
29 McCormack Street

85. Brombier, Marshall
1 Canton Road Apt. 2

86. Coffey, William F.
3 Haskell Street

87. Crouse, Nancy E.
42 Clewley Road

88. Deren, Gloria J.
130 Bowdoin St. Apt. 1106

84.00 74-27943 06/29/32 OP NN
Wollaston

84.00 74-43953 04/09/44 OP NN
Newburyport

84.00 74-43145 06/12/50 TP NN
Hadley

84.00 74-26712 01/10/45 TP YY
Brighton

84.00 74-36596 07/13/31 TP NN
Quincy

83.00 74-30684 09/29/06 TP YY
Malden

83.00 74-41127 02/22/43 TP NN
North Quincy

83.00 74-32130 07/15/49 OP NN
Norton

83.00 74-39012 03/14/42 TP YY
Medford

83.00 74-42977 05/09/50 OP NN
Boston

140

89. Donovan, John T.
14 Sherman Road

90. Keough, Paul G.
24 Glenellen Road

91. Lynch, Frederick E.
132 Magazine Street

92. O'Brien, Marnette S.
122 Babcock Street

93. Brandeis, Paul S.
23 Lanark Road

94. Breen, Dorothy M.
132 Magazine Street

95. Cogen, Bernice E.
17 Rock Glen Circle

96. Gottwald, John F.
8 Fairlawn Avenue

97. Russo, Ronald J.
64 Marlboro Street

98. Bolger, Jeffrey S.
570 North Main Street

83.00 74-34829 10/20/35 TP YY
Dedham

83.00 74-24420 07/21/52 TP YY
West Roxbury

83.00 74-26208 12/24/41 OP NN
Cambridge

83.00 74-25865 11/06/34 TP NN
Brookline

82.00 74-26160 12/17/49 OP NN
Brighton

82.00 74-26209 03/24/17 TP YY
Cambridge

82.00 74-37309 05/27/17 TP NN
Medford

82.00 74-42773 01/23/50 TP NN
Mattapan

82.00 74-21209 12/06/42 TP YY
Belmont

81.00 74-20804 02/22/50 TP YY
Randolph

141

99. Dube, Peter C.
350 Acrebrook Drive
100. Heinig, Thomas H.
227 Chapman Street
101. Kaufman, Judith A.
41 Ridgemont Street
102. McManus, Michael T.
74 Francis Street
103. Naughton, Thomas J.
137 Bridge Street Apt. 3
104. O'Hearn, Barbara
P.O. Box 178
105. Saller, Edward G.
21 Evergreen Ave. Apt. 138
106. Short Jr., William D.
193 High Street
107. Sonnenberg, Margaret W.
25 Curtis Street
108. Thompson, Joan P.
47 Summer St. Apt. 4

81.00 74-35130 04/27/49 TP NN
Florence
81.00 74-39570 03/30/37 TP YY
Greenfield
81.00 74-40579 12/24/46 TP NN
Brighton
81.00 74-39010 09/03/46 TP NN
Boston
81.00 74-35328 03/14/48 OP NN
Newton
81.00 74-43147 07/15/23 TP NN
Pittsfield
81.00 74-27138 11/04/47 OP NN
Hartford
81.00 74-39387 05/29/48 OP NN
Greenfield
81.00 74-33708 10/27/14 OP NN
Somerville
81.00 74-27447 09/13/32 TP YY
Waltham

142

109. Carbine, David J.
430 Main Street
110. Duhigg, Michael F.
46 Pine Point Road
111. Facchetti, Edward
48 Carey Road
112. Levites, Alan G.
13 Gloucester Street
113. O'Brien, Sarah H.
118 Town Street
114. Offutt, Timothy L.
19 17 W Baltimore St.
115. Phelan, Joseph E.
P.O. Box 419
116. Rapo, Paul S.
31 Goddard Street
117. Sleison, William L.
160 Clark Street
118. St. Cyr Jr., Lawrence M.
453 Patterson Hse.

90.00 74-30650 05/02/44 TP YY
So. Deerfield
80.00 74-25341 12/20/43 TP NN
Stow
80.00 74-38907 06/05/50 DP NN
Needham
80.00 74-39083 11/14/44 OP NN
Boston
80.00 74-33022 12/25/16 TP NN
Braintree
80.00 74-26180 05/28/49 TP NN
Lynn
80.00 74-31031 09/24/48 TP YY
Durham
80.00 74-42932 04/09/48 TP YY
Southbridge
80.00 74-31241 05/24/51 TP NN
Salem
80.00 74-29217 02/10/52 TP NN
U. of Mass./Amherst

143

119. Thompson, Kathryn E. 12 Agawam Road	80.00	74-27119	03/20/19	TP	YY
120. Bellew, Joanne M. 5 Appleton Avenue	79.00	74-25132	04/27/30	TP	YY
121. Bergeron, Constance M. East State St.	79.00	74-34824	11/23/23	TP	NN
122. Boyadjian, James A. 68 Morningside Drive	79.00	74-34744	02/16/48	TP	YY
123. Cusick, Ursula 43 Cushing Street	79.00	74-43998	05/09/17	TP	YY
124. Hines, Patrick J. 88 Cherry Street	79.00	74-29749	08/23/30	TP	YY
125. Lewicki, Mitchell F. 777 Lagrange Street	79.00	74-24187	06/03/47	TP	NN
126. Noonan, Dorothy E. 24 Moran Street	79.00	74-24507	08/05/33	OP	NN
127. Picardo, Steven A. 195 Sheridan Avenue	79.00	74-26653	02/08/49	TP	NN
128. Ruderman, Bruce M. 45 Sheridan Dr. Apt. 12	74-24947	12/19/49	TP	NN	

129. Shanahan, Eunice P. 8 North Ames Street	79.00	74-30356	12/29/19	OP	NN
130. Hertz, George K. 30 Allston St. Apt. 35	78.00	74-42242	06/18/46	TP	NN
131. Koblinsky, Joseph P. 43 Acton Street	78.00	74-32487	08/02/48	TP	NN
132. Skerry Jr., Richard A. 110 Washington St.	78.00	74-36291	05/14/51	TP	NN
133. Smith, Gisele L. 15 Raleigh Road	78.00	74-36067	02/04/24	TP	NN
134. Boncoddio, Gerard J. 54 Selwyn Road	77.00	74-27907	04/03/52	TP	NN
135. Borrero, Joan 25 Lorraine Terrace	77.00	74-37586	08/06/37	TP	YY
136. Curley, Gertrude A. 373 Main Street	77.00	74-44024	09/24/21	TP	YY
137. Donovan, Marion F. 952 East Broadway	77.00	74-27451	02/18/32	TP	NN
138. Gallagher, George M. 10 Vesey Road	77.00	74-33323	04/01/40	TP	NN

139. Hartnett Jr., Leo M. 13 Sharon Avenue	77.00 74-42727	12/09/52	TP NN	Auburn
140. Lettich, Mark R. 24 Sunset Road	77.00 74-41408	07/19/51	OP NN	Salem
141. Luatman, Barbara S. 15 Fenwick Place	77.00 74-26194	09/21/33	TP YY	Boston
142. Loda, Peter W. 106 Revere Street	77.00 74-38789	04/05/49	OP NN	Boston
143. Pysz, Paul E. 200 Kelton Street Apt. 5	77.00 74-35049	09/06/50	TP NN	Allston
144. Wholey, James J. 14 Shadow Drive	77.00 74-41130	07/30/52	TP NN	Lowell
145. Carabetta, Michael R. 128 Elm Street	76.00 74-35048	05/23/49	OP NN	Belmont
146. Connolly, David H. 63 Summer Street	76.00 74-28217	10/07/46	TP YY	Saugus
147. Forsythe, Jeffrey P. 644 Adams Street	76.00 74-40145	02/28/51	OP NN	Dorchester
148. Hirshberg, Robert M. 25 Brighton Ave. Apt. 3	76.00 74-39564	10/30/48	TP NN	Allston

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149. Johnson, Chester G. 116 So. Main Street	76.00 74-39018	06/07/47	TP NN	Sharon
150. Kerivan, Rita M. 75 Pilgrim Road	76.00 74-34042	12/20/19	TP YY	Wellesley
151. Waldman, James T. 40 Monastery Road	76.00 74-33368	07/28/50	TP NN	Brighton
152. Corliss, William M. 33 Silver Street	75.00 74-41754	03/13/42	TP NN	Quincy
153. Day, William A. 78 Lake Shore Drive	75.00 74-43097	11/24/49	TP NN	Dracut
154. Frazier, Grant T. 57 Garfield Avenue	75.00 74-24815	05/16/47	OP NN	Weymouth
155. Jamilkowski, Michael L. 15 Peckham Street	75.00 74-28252	04/17/48	OP NN	New Bedford
156. Kelley Jr., Francis M. 66 William Street	75.00 74-30929	10/30/47	TP NN	Walpole
157. Lotti, John J. 102 Sachem Street	75.00 74-44021	01/09/43	TP YY	Wollaston
158. Malley, Kevin H. 476 Beacon Street	75.00 74-42352	06/25/49	TP YY	Boston

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159. McCrann, Eunice R. 6 Laban Pratt Road	75.00 74-29751 04/17/16 TP YY	
160. Orr, Daniel J. 34 Lindenwood Road	75.00 74-21386 11/05/46 OP NN	
161. Scaglione Jr., Peter T. 16 Clancy Street	75.00 74-43820 07/28/46 OP YY	
162. Tomlinson, David P. 218 Lakeshore Dr. Apt. 3	75.00 74-43412 02/16/43 OP NN	
163. Decker, John F. 35 Woodland Road	74.00 74-38018 06/15/43 TP YY	
164. Krusiewski, Barbara A. 25 Franklin Street	74.00 74-30166 08/15/38 TP NN	148
165. Mazzaferro, Linda A. 62 Castle Road	74.00 74-38664 07/06/49 OP NN	
166. Morgan, Virginia L. 114 Swan Street	74.00 74-37050 11/07/25 TP NN	
167. O'Malley, William F. 44 Humphreys Street	74.00 74-34675 03/13/44 TP YY	
168. Reardon, Joseph J. 23 Partridge Avenue	74.00 74-35668 02/09/41 TP NN	

169. Ruggiero, Wayne A. 37 Poole Street	74.00 74-33705 01/27/53 TP YY	
170. McClure, John S. 20 Spalding Street	73.00 74-43222 03/10/49 TP YY	
171. Milano, Arthur H. 10 California Park	73.00 74-42690 02/16/39 OP NN	
172. Schwalm, Janet M. 3 Concord Square	73.00 74-38688 03/21/49 TP YY	
173. Zazopoulos, Andrew A. 5 Downing Avenue	73.00 74-20737 10/14/50 TP YY	
174. Lutz, Dale A. 62 Carey Ave. Apt. 4	72.00 74-27392 09/14/49 TP YY	149
175. Neilo, Roger B. 39 Myrtle Street	72.00 74-43659 11/16/49 TP YY	
176. Rosenberg, Ellen B. 44 Atherton Road	72.00 74-38019 11/01/52 TP NN	

END OF REPORT

EXHIBIT 8.

Administrative Assistant

No. Denoting Rank on List	Name of Veteran	Discharge Date	Military Branch
1	Malloy, Charles H.	Sept. 1945	Army
2	Incrovato, James D.	Feb. 28, 1974	Air Force
3	Rowland, Joseph M.	no military info available	
4	Higgins, Richard D.	no military info available	
5	Linehan, Leo M.	May 4, 1955	Marine Corps
6	Finn, Henry L., Jr.		Army
7	Lynch, Kalman J.	April 1953	Army
8	McCarthy, Joseph M.		
9	Brown, Maurice C.	Nov. 22, 1945	Army
10	Kelly, Thomas F.	March 31, 1946	Army
11	Morse, Robert W.	Nov. 14, 1945	Army
12	Natola, Generoso J.	Nov. 16, 1945	Army
13	Collins, James R.	March 24, 1946	Army
14	Smith, Albert W.	Feb. 20, 1973	Air Force
15	Stundze, Ronald F.		Navy
16	Gondelman, Morton N.	March 4, 1946	Army
17	Swain, Francis J.	no military info available	
18	Casella, Natal J.	July 13, 1945	Army
19	Rooney, Harold H.	no military info available	
20	Callagy, Thomas A.	Feb. 28, 1974	Army
21	Harrington, Joseph P.	Feb. 26, 1946	Navy
22	Kerig, John A.	Dec. 31, 1966	Air Force
23	Murphy, Jeremiah V.	April 3, 1946	Army
24	Vito, Henry J.	March 4, 1948	Army
25	Kessler, Simon M.	Jan. 11, 1946	Army
26	Slamin, Joseph W.	Feb. 1956	Marine Corps
27	Campbell, Eugene J.	Aug. 24, 1956	Army
28	Cawley, Joseph P., Jr.	March 30, 1972	Army
29	Hartwell, Ivan G.	April 30, 1953	Army

No. Denoting Rank on List	Name of Veteran	Discharge Date	Military Branch
30	McCarney, Thomas J.	no military info available	
31	Armstrong, Albert E., Jr.	June 9, 1968	Army
32	King, Albert W.	June 13, 1945	Army
33	Latremouille, Robert J.	Oct. 1963	Army
34	Grublin, Alex R.	Aug. 5, 1945	Army
35	Hurley, John P.	Feb. 22, 1972	Army
36	Jaeger, Robert C.	Sept. 1969	Army
37	Kovacs, Henry E.	Nov. 24, 1945	Army
38	Leavy, Gerald B.	Dec. 5, 1967	Army
39	Cagney, Maurice J.	no military info available	
40	Gilday, John A.	Oct. 18, 1971	Marine Corps
41	Hogan, Harry V.	June 29, 1957	Army
42	Martorano, Nicholas B.	Dec. 1970	Army
43	Oleary, John T.	Aug. 20, 1962	Air Force
44	Prager, Bruce R.	Feb. 18, 1972	Army
45	Sherman, May F.	no military info available	
46	Sullivan, Richard J.	Oct. 1, 1970	Navy
47	O'Donnell, Dennis M.	April 15, 1959	Marine Corps
48	Philbrick, Bruce H.	Aug. 31, 1973	Navy
49	Recko, William R.	Oct. 1955	Navy
50	Ernst, David R.	Feb. 11, 1971	Army
51	Leacock, William R.	no military info available	
52	Murstein, Irving	no military info available	
53	Scull, Edward T., Jr.	July 19, 1967	Army
54	Collins, William J.	Nov. 28, 1969	Army
55	Demerritt, Roger S.	March 26, 1970	Army
56	Hart, Robert E.	Dec. 3, 1971	Army
57	Kelly, John P.	July 22, 1970	Army
58	Philbrick, Donald M.	Dec. 20, 1972	Navy
59	Drever, Robert I.	Jan. 14, 1946	Army
60	Codinha, Paul P.	July 8, 1960	Army
61	Crisafulli, Anthony P.	March 22, 1972	Army
62	Phillips, Edward A.	Sept. 3, 1964	Army
63	Ruddy, Richard A.	Jan. 17, 1969	Army
64	Seroll, William G.	May 1972	Army

EXHIBIT 9.

DIVISION OF CIVIL SERVICE

Eligible List

ESTABLISHED BY DIRECTOR OF CIVIL SERVICE

October 25, 1974

Counsel I

State Service

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Examination held 05/31/74

16 Women — 173 Men Examined

13 Women — 144 Men Eligible

1. Brennan, James A. 30 Sutherland Street	D.V. 94.00 74-26250	12/18/43	TP N
2. Mullonney, Henry G. 55 Elmwood Park	D.V. 84.00 74-00162	04/06/12	OP N
3. Sisk, Vincent E. 192 Highland St.	D.V. 84.00 74-41629	11/10/30	TP Y

4. Seifert, Francis T. 219 Worcester Road	D.V. 82.00 74-06955	10/22/21	OP N
5. Salt, Albert E. 198 Campbell Avenue	D.V. 82.00 74-07895	10/27/22	TP N
6. Brett, Thomas A. 54 Yale Street	D.V. 82.00 74-20706	04/19/14	TP Y
7. McLaughlin, John L. 91 Longfellow Road	D.V. 82.00 74-24420	04/24/19	OP N
8. Burrill, John B. 139 Church Street	Vet. 94.00 73-63796	11/14/43	TP Y
9. Bader, Benedict 75 St. Alphonsus St.	Vet. 92.00 74-02449	07/29/26	TP Y
10. Raitanen, Kauko K. 30 Highland Avenue	Boston		
11. Latrenoville, Robert J. 67 Highland Avenue	Vet. 92.00 74-06422	05/26/23	OP N
12. Eastman, Frank B. 1179 Boylston Street	Lowell		
13. Mueller Jr., William C. 12 Ledgewood Drive	Vet. 90.00 73-61576	11/16/42	TP Y
	Cambridge		
	Vet. 90.00 74-06186	10/17/44	OP Y
	Boston		
	Vet. 89.00 73-65395	11/19/30	TP Y
	Danvers		

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14. Cassavant Jr., Robert J. 90 Pleasant Street	Vet. 89.00 74-03188 01/02/37 OP Y	
15. Menahan, Brian T. 82 Middlesex Road	Vet. 87.00 74-00163 06/24/39 TP N	
16. Prior, George T. 25 Candlewood Lane	Vet. 87.00 74-14425 01/31/36 OP Y	
17. Bailey, Edward J. 239 Cypress Street	Vet. 87.00 74-24041 09/17/44 TP N	
18. Haggard, John W. 5110 Washington St.	Vet. 84.00 74-06283 06/27/12 OP N	
19. Pleshaw, Robert J. 148 State Street	Vet. 84.00 74-13593 07/28/33 TP Y	154
20. Kozloski, William A. 16 Highland Place	Vet. 82.00 73-65373 07/09/18 TP Y	
21. Doyle Jr., James C. 27 Cherokee Road	Vet. 82.00 74-00992 03/23/33 TP N	
22. Daly Jr., John F. 114 Brooks Street	Vet. 82.00 74-01457 12/01/12 TP Y	
23. Dooley, Leo J. 26 Goodman Road	Vet. 82.00 74-01459 12/24/20 TP N	

24. Vito, Henry J. 63 Norfolk Street	Vet. 82.00 74-01516 05/01/28 TP Y	
25. Westwater, Donald W. 19 Englewood Road	Vet. 82.00 74-03654 08/14/25 OP N	
26. Dillon, William W. P.O. Box 182	Vet. 82.00 74-04282 06/29/28 TP Y	
27. Bent, George F. 2 Hawthorne Place	Vet. 82.00 74-07260 03/06/21 OP N	
28. Hicks, Arthur W. 23 Hoover Street	Vet. 82.00 74-07985 11/29/30 TP Y	
29. Kalbross Jr., Seth M. 39 Bolton Road	Vet. 82.00 74-09175 07/26/25 OP N	155
30. Sisk, John F. 24 Beechnut Circle	Vet. 82.00 74-09235 04/25/32 TP N	
31. Camann, Milton H. 4 Amelia Avenue	Vet. 82.00 74-09735 01/26/19 TP Y	
32. Lewis, Harvey G. 15 Hemlock Terrace	Vet. 82.00 74-11868 05/30/43 OP N	
33. Hillery, Thomas R. 66 Willow Road	Vet. 82.00 74-11983 03/13/28 TP Y	

34. Cieri, Joseph A. 32 Garrison Avenue	Vet. 82.00 74-12802	09/13/09	OP	N
35. Myers, Wallace W. 78½ Elm Street	Vet. 82.00 74-13511	11/21/29	TP	Y
36. Crowley, Robert F. 71 Millis Road	Vet. 82.00 74-13557	10/27/18	OP	Y
37. Kelley, James W. 34 Norton Road	Vet. 82.00 74-14221	03/03/26	OP	Y
38. Pickett, Alfred J. 19 Hillcrest Road	Vet. 82.00 74-14419	01/03/29	TP	Y
39. McCarthy, William A. 8 Academy Road	Vet. 82.00 74-14424	09/28/32	OP	Y
40. Kearney, Henry F. 659 Hyde Park Ave.	Vet. 82.00 74-14442	12/02/25	OP	N
41. Shaw, Albert V. 33 Emerson Road	Vet. 82.00 74-14919	07/29/30	TP	Y
42. Lyons Jr., Lawrence N. 20 Eisenhower Road	Vet. 82.00 74-17336	04/11/14	OP	N
43. Wright, John N. 81 Argilla Road	Vet. 82.00 74-18514	10/21/23	TP	Y

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44. Ryan, Michael J. 19 Edward Avenue	Vet. 82.00 74-19360	04/11/15	TP	Y
45. Arenella, Nicholas P. 20 Larchmont Avenue	Vet. 82.00 74-24090	11/28/22	TP	N
46. Long Jr., James J. 25A Totman Drive	Vet. 82.00 74-26098	12/17/37	TP	Y
47. Gledhill Jr., John A. 66 Sierra Road	Vet. 82.00 74-26768	08/05/31	TP	Y
48. Lee, Melvin F. 653 Concord Avenue	Vet. 82.00 74-27582	06/25/25	TP	Y
49. Donovan, John J. 17 Green Street	Vet. 82.00 74-27949	11/14/22	OP	N
50. Mullins, Patrick J. 36 Avalon Road	Vet. 82.00 74-30969	03/17/18	OP	N
51. Finnegan, James W. 11 Pomeroy Street	Vet. 82.00 74-32121	09/30/21	OP	N
52. Donohue, David A. 236 Lake Avenue	Vet. 82.00 74-40112	03/22/23	OP	N
53. Censullo, Alfred 290 Meridian Street	Vet. 82.00 74-41012	11/01/25	TP	N

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54. Gillen, Fred E.
42 Richland Avenue
55. Mahoney, Paul F.
93 Crest Avenue
56. Demarco, Anthony J.
61 Aspen Road
57. Anthony, Carol A.
123 Sewall Avenue
58. Brook, James
329 Harvard Street
59. Hare, Brendan M.
26 Indian Hill Road
60. Larkin, James J.
54 Bluff Road
61. Rosenfield, Carl F.
92 Harnden Avenue
62. Portnoy, Michael J.
10E Austin Court
63. Kouri, Kevin W.
36 Mossdale Road

Vet.	82.00	74-41017	12/28/08	TP	Y
Wellesley					
Vet.	82.00	74-41290	11/18/38	TP	Y
Winthrop					
Vet.	80.00	74-06135	12/05/44	TP	Y
Swampscott					
	94.00	74-02057	05/18/46	TP	N
Brookline					
	94.00	74-03354	12/01/46	OP	N
Cambridge					
	94.00	74-04549	10/07/45	TP	Y
Arlington					
	94.00	74-05879	11/19/38	TP	N
No. Weymouth					
	94.00	74-05880	02/22/47	TP	N
Watertown					
	94.00	74-09249	05/12/47	TP	Y
Saugus					
	94.00	74-10760	07/09/47	OP	Y
Jamaica Plain					

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64. Sherry, Paul J.
569 Washington Street
65. Smith, William J.
13 Elgin Street
66. Conway, Fredric L.
5477 Sheffield Court
67. Barton, William C.
19 Waltham Street
68. Fine, Norman J.
31 Englewood Avenue
69. McCarthy Jr, Leonard D.
235 B Lothrop Street
70. Luise, Vincent S.
127 Nahant Street
71. O'Brien, John J.
61 Huron Circle
72. Butler, Edward G.
1 Fay Road
73. Smith, Carol G.
39 River Street

	94.00	74-11518	11/01/46	TP	Y
Brighton					
	94.00	74-13442	11/14/47	OP	N
West Roxbury					
	94.00	74-14001	06/12/47	OP	N
Alexandria, Va.					
	94.00	74-14152	06/09/48	OP	NN
Somerville					
	94.00	74-16124	07/18/46	TP	NN
Brookline					
	94.00	74-20800	06/16/41	TP	YY
Beverly					
	94.00	74-24040	01/12/50	TP	YY
Lynn					
	94.00	74-25874	07/22/48	TP	NN
Dorchester					
	94.00	74-28054	05/13/43	TP	YY
Dedham					
	94.00	74-41598	02/14/37	TP	YY
Plymouth					

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74. Ziff, Barry D. 43 Sheridan Drive	94.00	74-53915	08/27/42	TP	YY
75. Kaczynski, Michelle A. 67 Rebecca Road	92.00	74-03480	04/16/67	TP	NN
76. Gittes, Betty A. 11 Warwick Road	92.00	74-03969	07/24/46	TP	YY
77. Itri, Ronald J. 288 Roslindale Ave.	92.00	74-05092	09/25/44	TP	NN
78. Miller, Joel M. 455R Sea Street	92.00	74-06174	01/23/47	OP	NN
79. Asadoorian, Richard J. 57 Morningside Road	92.00	74-07911	05/23/44	OP	NN
80. Cohan, Michael B. 1992 Bennington St.	92.00	74-08637	04/11/47	TP	NN
81. Rossman, Neil P.O. Box 201	92.00	74-08841	05/29/45	OP	YY
82. Levine, Jeffrey A. 142 Hayward Street	92.00	74-09385	06/21/47	OP	NN
83. Pressman, Paul E. 60 Hopkins Street	92.00	74-11826	01/18/48	TP	YY

84. Braga, James A. 17 Merrill Street	92.00	74-11861	04/03/43	TP	YY
85. Whitkin, Steven A. 14 Southmere Road	92.00	74-12339	08/19/46	TP	YY
86. Gollinger, John F. 6227 Garden Circle	92.00	74-14421	04/03/48	OP	NN
87. Barry, William F. 429 Chandler Street	92.00	74-14909	09/13/40	TP	NN
88. Kahalas, Howard W. 6 Beacon Street	92.00	74-14926	06/26/47	TP	YY
89. Shavell, Catherine E. 80 Carroll Street	92.00	74-19934	11/25/46	TP	YY
90. Karas, Melvin A. 60 Franklin Street	92.00	74-26306	04/07/45	OP	N
91. McNulty, William J. 1 Tara Drive	92.00	74-28918	08/20/48	TP	Y
92. Zimmerman, Howard M. 95 Carolina Avenue	92.00	74-30014	07/31/47	OP	N
93. Bernstein, Alan S. 69R Ondine Avenue	92.00	74-33902	07/16/43	TP	Y

94. Noonan, Robert E. 93 Sagamore Avenue	90.00 74-02053	07/06/47	TP	Y
95. Hayes, Richard J. 106 Dorchester St.	90.00 74-03655	08/25/48	OP	Y
96. Anyzeski, Michael C. 1277 Comm. Avenue	90.00 74-04551	12/17/46	TP	Y
97. Kilian, Patricia R. 18 Mason Avenue	90.00 74-05623	03/11/49	OP	N
98. Liesperance, Robert P. 1253 Beacon Street	90.00 74-07656	02/25/46	TP	Y
99. Johnson, Ronald P. 28 Hilltop Street	90.00 74-09297	02/13/36	TP	Y
100. Pauli, Richard A. 55 Queensberry St.	90.00 74-10692	03/25/48	TP	Y
101. McNeil, Alexander H. 57 Beacon Street	90.00 74-10767	01/20/48	TP	N
102. Kesselman, Arthur 169 Chestnut Street	90.00 74-11889	06/22/48	OP	N
103. Goldberg, Chester S. 191 Winthrop Road	90.00 74-13075	06/15/48	OP	N

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104. Bronson, Peter R. 13 Orkney Road	90.00 74-13464	01/20/48	OP	N
105. Lambert, Laurent P. 11 Sullivan Drive	90.00 74-14422	06/21/43	OP	Y
106. O'Flaherty Jr, William J. 50 Pleasant Street	90.00 74-21232	02/16/48	OP	N
107. McLaughlin, James T. 40 Briarches Lane	90.00 74-21396	12/03/42	OP	Y
108. Mandell, Andrew L. 21 Fuller Street	90.00 74-26724	05/05/45	OP	N
109. Knee, Kenneth M. 110 Winchester St.	90.00 74-33586	03/24/48	TP	Y
110. Taylor, Marie C. 700 Third Avenue	90.00 74-34134	03/02/46	OP	N
111. Downey, Jr. John J. 198 Fuller Street	90.00 74-42237	12/11/44	TP	Y
112. Lipofsky, Adele G. 15 Knowles Street	89.00 74-10720	11/25/44	TP	Y
113. Sylvester, Robert E. 15 Memorial Road	89.00 75-35421	12/16/45	T	P

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114. Usdan, Dennis M.
125 Chiswick Road
115. Baker, Carol F.
25 Farmview Avenue
116. Szarkowski, Lester J.
55 Cranmere Lane
117. Oken, Robert T.
84 Colonel Bell Dr.
118. Troy, Richard J.
56 Westover Street
119. Davidson, Howard A.
3 Badger Circle
120. Torto, Richard T.
206 Eastern Avenue
121. Bradley, Craig M.
33 Mountainview Dr.
122. Alexander, Robert N.
226 No. Harvard St.
123. Dellhery III, Patrick
1459 V. F. W. Pkwy.

89.00	74-47176	11/14/46	T	P
Brighton				
87.00	74-00529	05/16/46	O	P
No. Andover				
87.00	74-04340	09/19/43	T	P
Melrose				
87.00	74-04857	02/10/47	O	P
Brockton				
87.00	74-04859	09/28/39	O	P
Everett				
87.00	74-13339	07/12/45	O	P
Milton				
87.00	74-14077	10/25/45	T	P
Lynn				
87.00	74-14423	07/21/41	T	P
Westwood				
87.00	74-17124	06/14/45	T	P
Allston				
87.00	74-24568	12/26/46	T	P
West Roxbury				

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124. Gallese, Paul D.
472 Broad Av
125. Kerwin, Mary A.
15 Grant Street
126. Runyan, Harley L.
33 State Street
127. Albright, Birge
441 Shawmut Avenue
128. Fagan, Stephen H.
3 Churchhill Road
129. Talbot, Walter A.
116B Pembroke Street
130. McMahon, Ethel
34 Broad Street
131. Barry, David F.
30 Clarendon Terrace
132. Coran, Ruth W.
46 Lincoln Street
133. Leonard, Daniel J.
97 50, Beaudin St.

87.00	74-28601	05/14/46	O	P
Cambridge				
84.00	74-00803	03/14/47	O	P
Somerville				
84.00	74-14159	02/25/32	T	P
Springfield				
84.00	74-41125	07/01/35	T	P
Boston				
82.00	74-00528	08/10/41	T	P
Norfolk				
82.00	74-02734	08/27/44	T	P
Boston				
82.00	74-04855	02/24/17	O	P
Lynn				
82.00	74-05350	08/03/40	T	P
Swampscott				
82.00	74-05352	00/00/00	T	P
Belmont				
82.00	74-05645	09/15/28	T	P
Lawrence				

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134. Barrett, Robert E.
56 Concord Avenue
135. Cox, Jerome W.
131 Ruggles Street
136. Mahanna, George J.
53 State Street
137. Lehane, Michael C.
7 Greentree Lane
138. Mulan, Edward J.
815 Essex Street
139. Polvere, Daniel M.
33 Monument Sq.
140. Redman, Herbert J.
4 Windemore Circle
141. Drenzo, Frank J.
140 Chestnut Street
142. Keach Jr, John A.
855 Foundry Street
143. Leonard, William M.
46 Draper Street

82.00	74-06979	07/09/45	T	P
Milton				
82.00	74-07577	01/16/42	T	P
Westboro				
82.00	74-07906	12/24/14	OP	Y
Boston				
82.00	74-08890	08/09/41	TP	N
Rowley				
82.00	74-09291	03/11/15	OP	N
Lawrence				
82.00	74-09729	02/25/42	TP	Y
Charlestown				
82.00	74-10675	11/28/04	OP	Y
Braintree				
82.00	74-10935	09/03/18	OP	N
No. Attleboro				
82.00	74-11368	10/09/38	TP	Y
South Boston				
82.00	74-11441	02/07/41	TP	Y
Dorchester				

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144. Scola, Richard J.
14 Cleverdale Road
145. McColough, William F.
95 Douglas Road
146. Smith, Helen A.
91 Faneuil Street
147. Nolan, Robert B.
56 Fifth Avenue
148. Zimanne, Stuart
581 Beaver Pk. Rd.
149. Vaughan, John W.
81 Fremont Avenue
150. Dowcett, John P.
193 Ashcroft Road
151. Burns, James
5 Greentree Lane
152. Connors, William J.
68 Munroe Street
153. Mahoney, James B.
61 Board Street

82.00	74-12694	07/14/42	OP	Y
Newton Hlnds.				
82.00	74-12753	08/09/41	OP	N
Lowell				
82.00	74-12793	01/08/21	TP	Y
Brighton				
82.00	74-13632	12/25/17	TP	Y
Lowell				
82.00	74-13965	10/22/40	OP	Y
Frammingham				
82.00	74-14929	04/03/33	TP	N
Chelsea				
82.00	74-21234	09/12/24	TP	Y
Medford				
82.00	74-21379	05/30/30	TP	N
Revere				
82.00	74-23280	10/13/31	TP	N
Belmont				
82.00	74-39004	11/04/38	TP	Y
Weymouth				

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154. Anastas, Franklin P. 12 Cable Road	82.00 74-40041 02/25/44 OP Y	North Quincy
155. Kruger, Martin 289 Baynard Drive	82.00 74-40242 02/06/34 OP N	Norwood
156. Jarvis, Robert F. 10 Haskell Street	82.00 74-41280 12/30/25 OP N	Gloucester
157. Hamanoss, John 50 Chestnut St.	82.00 74-42225 02/04/30 TP Y	Charlestown

END OF REPORT

EXHIBIT 10.

Counsel I

No. Denoting Rank on List	Name of Veteran	Discharge Date	Military Branch
1	Brennan, James A.	Aug. 27, 1969	Army
2	Mullonhey, Henry G.		
3	Fisk, Vincent E.	Feb. 1, 1956	Navy
4	Seifert, Francis T.	Feb. 1, 1946	Army
5	Salt, Albert E.	Jan. 15, 1946	Navy
6	Brett, Thomas A.	Nov. 13, 1945	
7	McLaughlin, John L.	Nov. 19, 1945	
8	Burrill, John D.	June, 1970	Marine Corps
9	Daper, Benedict	no application in file	
10	Raitanen, Kauko K.	Feb. 2, 1946	
11	La Tremoville, Robert James	Oct. 4, 1973	Army
12	Eastman, Frank E.	Sept. 8, 1969	Army
13	Mueller, William Gerard, Jr.	Aug. 24, 1954	Air Force
14	Cassavant, Roland J.	Aug. 9, 1958	Army
15	Menahan, Brian T.	Nov. 3, 1964	Army
16	Prior, George T.	Aug. 25, 1958	Army
17	Dailey, Edward J. III	Dec. 31, 1966	Navy
18	Haddad, John H.	Dec. 1945	Army
19	Pleshaw, Robert J.	Feb. 25, 1955	Army
20	Kozloski, William A.	Feb. 1946	Army
21	Doyle, James C., Jr.	Dec. 31, 1959	Marine Corps
22	Daly, John	Jan. 14, 1946	Army
23	Dooley, Leo Joseph	Dec. 13, 1945	Navy
24	Vito, Henry	(WWII)	Army
25	Westwater, Donald M.	Feb. 16, 1946	Army
26	Dillon, William	no military info in file	
27	Bent, George F.	Oct. 21, 1945	Army
28	Hicks, Arthur W.	Nov. 22, 1952	Navy
29	Kalberg, Seth M., Jr.	July 1947	Navy

No. Denoting Rank on List	Name of Veteran	Discharge Date	Military Branch
30	Fisk, John F.	no military info in file	
31	Camann, Milton H.	Oct. 25, 1945	Army
32	Lewis, Harvey G	Jan. 1972	Army
33	Hillery, Thomas H.	Oct. 8, 1947	Army
34	Cieri, Joseph A.	no military info in file	
35	Myers, Wallace H.	Jan. 18, 1957	Army
36	Crowley, Robert F.	Feb. 28, 1947	Navy
37	Kelley, James W.	Aug. 1946	Naval Training School
38	Pickett, Alfred J.	no application in file	
39	McCarthy, William A.	Aug. 22, 1956	Army
40	Kearney, Henry F.	no military info in file	
41	Shaw, Albert V.	Sept. 13, 1957	Navy
42	Lyons, Lawrence W.	Dec. 1945	Navy
43	Wright, John W.	no military info in file	
44	Ryan, Michael J.	Feb. 3, 1946	Navy
45	Arenella, Nicholas P.	Jan. 15, 1946	Navy
46	Long, James J.	April 9, 1959	Army
47	Glenhill, John A.	1955	Army
48	Lee, Melvin F.	June 1946	Marine Corps
49	Donovan, John J.	Jan. 23, 1946	Army
50	Mullins, Patrick J.	no military info in file	
51	Finnegan, James	Sept. 15, 1945	Air Force
52	Donohue, David A.	no application in file	
53	Censullo, Alfred	Oct. 8, 1945	Army
54	Gillen, Fred E.	Sept. 17, 1942	Army
55	Mahoney, Paul F.	2 years	Coast Guard
56	DeMarco, Anthony J.	no military info in file	

EXHIBIT 11.

LAST FILING DATE: OCTOBER 2, 1974 OPEN CONTINUOUS

UNASSEMBLED EXAMINATION

Counsel 1 State Service

Wishing Disabled Veterans' Preference

1. Victor R. Davidson, 173 Rhoda St., Quincy	92.00
2. Peter D. Hoban, 6 Pleasant Ave., Somerville	90.00
3. William C. Bowen, 667 Main St., Worcester	82.00
4. Leonard A. Hanlon, 107 Harvard St., Medford	82.00

Wishing Veterans' Preference

5. John R. O'Malley, 69 Adams St., Norwood	94.00
6. William G. Billingham, 21 Archer Ave., Pembroke	92.00
7. William L. Cerruti, 490 Commonwealth Ave., Boston	92.00
8. Arthur I. Missan, 18 Erie St., Swampscott	92.00
9. John T. Robinson, 39 Sunset Rd., Arlington	92.00
10. David A. White, 29 Eliot St., Jamaica Plain	92.00
11. Frederick G. Feeley, Jr., 35 Waverly Ave., Everett	89.00
12. David S. Rosen, 12 Indian Head Heights, Framingham	89.00
13. Robert P. Doherty, 80 Pine Ridge Rd., Medford	84.00
14. Luciano Bartolomeo, 93 Boardman St., East Boston	82.00
15. John M. Collins, 17 South St., Medfield	82.00
16. Thomas X. Cotter, 22 Cowden St., Worcester	82.00
17. Melvin L. Dworet, 38 Clinton Rd., Brookline	82.00
18. Samuel B. Mesnick, 19 Oak Terrace, Malden	82.00

19. Robert B. McCormack, 106 Main St., Hingham 82.00
 20. Barnard Stonberg, 142 Grant Ave., Newton 82.00

Non Veterans

21. Arnold E. Cohen, 54 Royal St., Allston 94.00
 22. Robert A. Civiello, 43 Charter St., Boston 94.00
 23. Peter M. Gerard, 64 Revere St., Boston 94.00
 24. Kevin P. Grady, 27 Cambridge St., Worcester 94.00
 25. Gerald P. Hendrick, 283 High St., Medford 94.00
 26. Charles E. Miracle, 86 Buckingham St., Cambridge 94.00
 27. Edward J. Collins, 131 Southwick St., Agawam 92.00
 28. Stacy Cromidas, 27 Boyce St., Auburn 92.00
 29. Judith N. Dilday, 173 Everett St., Allston 92.00
 30. Nancy L. Elam, 882 Broadway, Somerville 92.00
 31. Ruth A. Gass, 20 Francis St., Brookline 92.00
 32. Bradley H. Geller, 62 Pleasant St., Brookline 92.00
 33. Roberta L. Golick, 1270 Beacon St., Brookline 92.00
 34. Joel H. Goober, 19 Gannett Terrace, Sharon 92.00
 35. Paul H. Granger, 393 Weston Rd., Wellesley 92.00
 36. David J. Hipwood, 75 Griggs Rd., Brookline 92.00
 37. Steven L. Kornstein, 61 Strathmore Rd., Brighton 92.00
 38. John J. Lahey, 235 Commonwealth Ave., Boston 92.00
 39. Michael W. Monk, 109 Winchester St., Brookline 92.00
 40. William J. Mostyn, 16 Westwood Rd., Somerville 92.00
 41. George T. O'Brine, 3 Locust St., Salem 92.00
 42. Edward J. Quinlan, 46 Leamington Rd., Brighton 92.00
 43. John E. Sabino, 314 West 77 St., New York, N.Y. 92.00

44. Robert A. Scandurra, 308 Commonwealth Ave., Boston 92.00
 45. Terence E. Scanlon, 35 Wallingford Rd., Boston 92.00
 46. Rhoda E. Schneider, 80 Francis St., Brookline 92.00
 47. Chris O. Stern, 10 Chauncy St., Cambridge 92.00
 48. Naomi R. Stonberg, 105 Valentine Rd., Milton 92.00
 49. James W. Stone, 2031 Commonwealth Ave., Brighton 92.00
 50. Gerald W. Tutor, 20 Ripley Terrace, Newton Centre 92.00
 51. Arnold R. Wallenstein, 24 Prescott St., Cambridge 92.00
 52. Foster Furcolo Jr., 6 Brooks Rd., Wayland 90.00
 53. Sandra M. Garrison, 288 Chestnut Hill Ave., Brighton 90.00
 54. Peter F. Keenan, Jr. 33A Alvarado Ave., Worcester 90.00
 55. Kevin J. McGinty, 44 Bittern Rd., Quincy 90.00
 56. Louis H. Steinhardt, 500 Revere Beach Boulevard, Revere 90.00
 57. Joelle D'Esti Bogdasarian, Rm. 1604 Labor Relation Comm., 100 Cambridge St., Boston 89.00
 58. Martha J. Koster, 37 Ashmont Rd., Waban 89.00
 59. Mary A. Gilleece, 8 Whittier Place, Boston 87.00
 60. Daniel J. Landau, 1874 Beacon St., Brookline 87.00
 61. Donald Moffat, 64 Maynard St., Arlington 87.00
 62. James A. Brett, 55 Blithewood Ave., Worcester 87.00
 63. Timothy F. Murphy, 587 Weld St., West Roxbury 87.00
 64. Margaret A. Cavanaugh, 309 Southwick Rd., Westfield 82.00
 65. Hartley C. Cutter, 45 Alberta Road, Brookline 82.00
 66. Frederick L. Fishman, 1970 New Rodgers Rd., Levittown Penn. 82.00
 67. June H. Gorman, 206 Summer St., Malden 82.00
 68. John P. Zelonis, Jr., P.O. Box 362, Cambridge 82.00

EXHIBIT 12.

Summary of Official Service — Ten Year Comparative Table

PERMANENT APPOINTMENTS								
Males				Females				Total
Year	Disabled Veterans	Veterans	Non-Veterans	Disabled Veterans	Veterans	Gold Star	Non-Veterans	
1973	119	1,240	1,130	5	31	7	2,016	4,548
1972	214	1,754	1,356	9	28	9	2,292	5,662
1971	155	1,353	1,255	22	26	6	2,005	4,822
1970	133	1,376	1,221	31	26	7	2,009	4,803
1969	181	1,297	1,290	16	25	7	1,867	4,683
1968	289	1,425	1,395	3	54	3	2,934	6,103
1967	218	1,000	1,200	2	23	2	1,716	4,161
1966	191	817	1,416	4	16	1	1,662	3,837
1965	240	825	1,101	7	18	3	1,665	3,859
1964	401	1,248	1,224	2	27	2	1,623	4,527

[Exhibits 13-81 are not reproduced by agreement of counsel.]

EXHIBIT 82.

UNITED STATES DISTRICT COURT
for the
DISTRICT OF MASSACHUSETTS.

HELEN B. FEENEY,
PLAINTIFF

v.

CIVIL ACTION
No. 75-1991-T

THE COMMONWEALTH OF MASSACHU-
SETTS, ET AL.,
DEFENDANTS

Affidavit of Helen B. Feeney.

I, Helen B. Feeney, being duly sworn, depose and say:

1. I am Helen B. Feeney and am the plaintiff in the above-entitled action.

2. I reside at 1826 Lakeview Avenue, Dracut, Massachusetts.

3. I am 53 years old.

4. I was married on March 3, 1951 and have two children, ages 23 and 22 and a stepson age 27.

5. My educational background is as follows:

(a) I received my high school diploma from Dracut High School in 1938.

(b) I subsequently have taken a number of courses including the following:

(i) a 20-credit accounting course at Bradshaw College in Lowell for which I was awarded a diploma in 1940.

(ii) a five-credit accounting course at Burdett College for which I received a certificate in 1941.

(iii) a two-credit history of economics course at Boston University for which I received a certificate in 1944.

(iv) an eight-credit course at the University of Massachusetts in Civil Defense Management for which I was awarded a certificate in 1967.

6. I am presently unemployed and have been unemployed since March 28, 1975, when I was laid off by the Commonwealth of Massachusetts from a permanent position in the official service of the Commonwealth classified as Federal Funds and Personnel Coordinator, Civil Defense Agency, State Division of Civil Defense.

7. My employment experience is as follows:

(a) From 3/15/48 through 8/29/52 I was employed as a Clerk for the New Haven Railroad.

(b) From 9/1/52 through 12/31/55 I was employed as General Manager at the Feeney Trucking Company, Lowell, Massachusetts.

(c) From 4/19/56 through 10/24/61 I was employed as an Administrative Assistant for Transport Clearings of New England, Inc., in Lowell,

(d) From 1/17/62 through 4/1/63 I was employed as an Administrative Assistant at Malden Limited in Lawrence, Massachusetts.

(e) From 4/24/63 through 8/13/67 I was employed by the Commonwealth of Massachusetts, Civil Defense Agency as a Senior Clerk Stenographer.

(f) From 8/13/67 through March 28, 1975, I was employed as Federal Funds and Personnel Coordinator for the Commonwealth of Massachusetts, Civil Defense Agency.

8. To the best of my recollection, the Civil Service examinations in addition to Administrative Assistant and Head Administrative Assistant at the Solomon Mental Health Center that I have passed and the circumstances relating to them are as follows:

(a) I passed an examination for Senior Clerk Stenographer sometime in 1962. This was the position to which I received a permanent appointment by the Commonwealth of Massachusetts on April 24, 1963.

(b) I passed a promotional examination held on April 2, 1966 for the position of Federal Funds and Personnel Coordinator, Civil Defense Agency with a score of 76.16. Two male veterans who received a two point promotional preference were originally appointed to fill two vacancies. Later one of these two appointees were promoted to another position, and I was offered and accepted the position. This is the job from which I was laid off on March 28, 1975.

(c) I passed a promotional examination held on April 15, 1967 for the position of Assistant Training Officer, Civil Defense Agency, State Division of Civil Service with a score of 74.68.

(d) I passed an open competitive examination held on February 6, 1971 for the position of Assistant Secretary, Board of Dental Examiners with a score of 86.68.

(e) I passed a promotional examination held on January 15, 1972 for the position of Area Director, State Division of Civil Defense (Grade 17) with a score of 84.24.

(f) I passed an open competitive examination held about February 22, 1972 for the position of Administrative Officer, Civil Defense Agency, State Division of Civil Defense (Grade 17). I do not recall my score. I was informed after the marks were released but before a list was established that the position was abolished.

(g) I passed an open competitive examination for the position of Assistant to the Director, Civil Defense Agency, State Division of Civil Defense with a score of 81.40.

9. On about February 24, 1973, I took the competitive examination for appointment to the permanent position of Head Administrative Assistant at the Solomon Mental Health Center ("Head Administrative Assistant"); I was found to qualify and achieved a score of 92.32, the third highest score; I was ranked fourteenth on the Head Administrative Assistant Eligible List established from that examination; in establishing the Head Administrative Assistant Eligible List, the Director, pursuant to the Veterans' Preference Statute, placed the names of twelve male veterans ahead of my name. Of these twelve veterans, eleven achieved lower scores on the examination. If the Head Administrative Assistant List had been established on the basis of examination scores, I would have been ranked third on the Head Administrative Assistant List and would have been certified for appointment. My name was not certified to the appointing authority for consideration for Head Administrative Assistant because of the application of the Veterans' Preference Statute.

10. At the time of the examination and at all times thereafter, including the present, I was interested in and remain interested in and would have considered accepting the position of Head Administrative Assistant.

11. At the time of the examination for the position of Head Administrative Assistant, I knew and understood that the Veterans' Preference Statute would be applied by the Director of Civil Service in establishing the Head Administrative Assistant Eligible List.

12. On about May 18, 1974, I took the competitive examination for appointment to permanent positions classified as Administrative Assistant. I was found to qualify and achieved a score of 87 and was ranked seventieth on the Administrative Assistant Eligible List established by the Director in April, 1975. In establishing that eligible list, the Director, pursuant to the Veterans' Preference Statute, placed ahead of my name the names of all veterans of whom about fifty of these veterans achieved lower grades on the examination. If the Veterans' Preference Statute had not been applied by the Director in establishing the Administrative Assistant Eligible List and if the Administrative Assistant Eligible List had been established on the basis of examination scores alone, I would have been ranked seventeenth on the Administrative Assistant Eligible List.

13. At the time of the examination for positions classified Administrative Assistant and at all times thereafter, including the present, I was interested in and remain interested in and would consider accepting a permanent position classified Administrative Assistant.

14. At the time of the examination for positions classified Administrative Assistant, I knew and understood that the Veterans' Preference Statute would be applied by the Director in establishing the Administrative Assistant Eligible List.

15. I understand that as of April 23, 1975, there were requisitions for seven permanent positions classified Administrative Assistant and that as of May 13, 1975, the Director began certifying names from the Administrative Assistant Eligible List

to appointing authorities for consideration to fill the requisitions for positions classified Administrative Assistant.

16. I understand that, as a result of my being ranked seventieth on the Administrative Assistant Eligible List rather than seventeenth, my name will not be certified for many job openings classified as Administrative Assistant and the chances of my name ever being certified to any appointing authority are significantly reduced.

17. Over the course of the last ten years, I have from time to time reviewed the Civil Service Notices of examinations, and I did not apply and take the examinations for many positions in which I was interested because I felt to apply and compete for these positions would be futile in light of the certain application of the Veterans' Preference Statute. I continue to be interested in Civil Service positions and desire to resume my career in the official service of the Commonwealth but I continue to feel that application and competition is likely to be futile in light of the certain application of the Veterans' Preference Statute.

18. Although I never made formal application to join the military service, in the early years of World War II I did inquire about programs for women in both the Navy and the Army. I was informed by the recruiters that programs for women were very limited and that there were more rigorous physical requirements for females as opposed to males. I was also informed that for females as opposed to males there had to be a particular opening at the time of enlistment for the particular skill of females or a female would not be enlisted. I was over 18 years of age at the time, but I was also informed that, since I was a female, I had to obtain parental consent. My mother (my father was deceased) refused to give me the required permission, stating to me that the general reputation of the type of female who joined the military was not good.

19. My experiences with the application of the Veterans' Preference Statute from 1963 through the present and particularly in applying for positions as Head Administrative Assistant and Administrative Assistant has caused me distress. It is frustrating and distressful to know that for most desirable positions in the official service for which I have competed or may compete with male applicants, I am denied the opportunity to compete based solely on relative ability and qualifications as reflected in the grades from the competitive examinations because I will always be ranked below veterans with lower examination grades.

HELEN B. FEENEY

[Jurat-omitted in printing.]

**United States District Court
for the District of Massachusetts.**

HELEN B. FEENEY,
Plaintiff

v.

CIVIL ACTION
No. 75-1991-T

THE COMMONWEALTH OF MASSA-
CHUSETTS, et al.,
Defendants

Affidavit.

I, Edward W. Powers, being duly sworn, depose and say:

1. I am Edward W. Powers and I reside at 7 Midland Circle, North Andover, Massachusetts 01810.

2. I held the position as Director of Civil Service, Division of Civil Service (the "Division"), the Commonwealth of Massachusetts from August 14, 1973 through June 30, 1975 and am the Edward W. Powers named in the complaints filed in *Anthony, et al., v. Commonwealth, et al.*, Civil Action No. 74-5061-T (D. Mass.) ("Anthony") and *Feeney v. Commonwealth, et al.*, Civil Action No. 75-1991-T (D. Mass.) ("Feeney"). Since my position as Director of Civil Service terminated on June 30, 1975, I am presently no longer a defendant in *Feeney* and am an individual defendant in *Anthony*.

3. During the second half of the fiscal year ending June 30, 1974, the Division implemented a new policy of giving "banding" examinations. This "banding" policy consists of giving a single, state-wide examination for each entry level classification rather than separate departmental examinations for the same classification.

4. At the same time that the above described "banding" policy was introduced, the Division changed the type of written examination given. Prior to "banding", Civil Service examinations traditionally tested an applicant's specific knowledge about the position for which he or she was applying. While such knowledge is essential for many jobs, other factors, such as, attitude, aptitude, and interpersonal skills are often better indicators of future job performance. The "banded" examinations have been designed to test for these more general job-related abilities rather than just specific knowledge about a particular job.

5. Prior to "banding", commonly only a small number of applicants passed an examination, and eligible lists were often quite short. True copies of eligible lists resulting from Civil Service examinations given for positions in one department established prior to "banding" are attached hereto and marked A, B, and C. Primarily as a result of state-wide "banded" examinations, much greater numbers of applicants (often hundreds) pass the examinations and eligible lists have become quite long. True copies of eligible lists resulting from "banded", state-wide examinations are the Counsel I Eligible List and the Administrative Assistant Eligible List attached hereto and marked D and E.

6. Prior to "banding", departments of the Commonwealth were frequently able to persuade the Division to tailor departmental entry examinations with such specific questions about the particular job that only those provisional appointees (often females) who were presently working in the job would pass the

examination or to tailor minimum entrance requirements on the basis of the background of the provisional so that others didn't even qualify to take the examination. These techniques would, in some cases, defeat the effect of the Veterans' Preference Statute although in numerous cases female eligibles were not certified for appointment because of the preference granted to veterans who had lower grades on the examination. Now that the Division is giving these banded examinations on a state-wide basis for a much larger number of jobs in the same classification, the continued application of the "absolute" veterans' preference will substantially diminish the opportunity for employment of women in positions for which open competitive examinations are given and for which men and women compete. Women will continue to be employed primarily in the relatively low-paying entry-level clerical positions for which men traditionally do not apply. However for the relatively high paying Civil Service positions, such as programmers, planners, psychologists, doctors, administrative assistants, head administrative assistants, etc., the continued use of the Veterans' Preference Statute will result in few, in any, female eligibles being considered and appointed to such positions.

7. The status of being a veteran, in and of itself, for purposes of applying the Veterans' Preference Statute is not a job-related criterion that is predictive of ability to perform in a job or of future job performance. The grade given to an applicant on a civil service examination is a function of his or her score on the written test and credit for relevant job-related training and experience. In the case of an "unassembled" competitive examination, the grades are determined by analyzing and crediting only job-related training and experience. Therefore, a veteran, who as part of his military service acquired relevant

job-related training and experience, receives credit in his civil service examination grade for such training and experience.

EDWARD W. POWERS

[Jurat omitted in printing.]

Attachment A.

DIVISION OF CIVIL SERVICE

ELIGIBLE LIST

ESTABLISHED BY DIRECTOR OF CIVIL SERVICE

Principal Programmer

St Dept of Corp & Tax

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EXAMINATION HELD 02/02/74

3 WOMEN 15 MEN EXAMINED

3 WOMEN 6 MEN ELIGIBLE

1. Campbell, Jr, Lawrence J. 5 Wilma Court	Vet. 84.00 73-64987 09/04/37 TP YY West Roxbury
2. Efstathiou, Andrew E. 33 Justin Road	Vet. 83.00 73-66506 05/25/31 TP YY Brighton

3. White, Duane 161 Perham Street	Vet. 82.00 73-61820 06/23/38 TP YY West Roxbury	187
4. DeBeneditto, Doris E. 135 Larkin Street	84.00 73-61552 10/06/46 TP YY Revere	
5. Garbino, Joseph T. 2 Arcadia Street	83.00 73-61555 10/09/40 TP YY Woburn	
6. Sanders, Jeanne M. 234 Fairmount Ave.	83.00 73-63029 09/01/34 TP YY Hyde Park	
7. Gelinas, Donald L. 2 Wildwood Street	81.00 74-02075 04/24/34 TP YY Burlington	
8. Hurley, Judith M. 24 Elm Place	80.00 73-61554 12/10/46 TP YY Somerville	
9. Lovell, Darryl B. 50 Heritage Lane	76.00 73-66510 07/15/45 TP YY Weymouth	

END OF REPORT

Attachment B.

ELIGIBLE LIST

ESTABLISHED BY DIRECTOR OF CIVIL SERVICE

August 24, 1973

Head Adim Assistant

Men hlth dr hcs men h c

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EXAMINATION HELD 02/24/73

7 WOMEN 25 MEN EXAMINED

4 WOMEN 12 MEN ELIGIBLE

1. Irvin, Joseph F. 77 Hamilton Street	D.V. 77.40 73-05171	11/17/25	TP YY
	Malden		08/24/73
2. Mangan, Edward P, 14 Belrose Avenue	Vet. 93.28 73-01921	07/06/29	TP YY
	Lowell		08/24/73

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3. Rodney, Harold 67 Barouche Drive	Vet. 90.20 73-05924	11/26/32	TP YY
	Marshfield		08/24/73
4. Ellerteen, Robert J. 5 Hamilton Road	Vet. 89.04 73-04960	05/28/45	TP YY
	Brookline		08/24/73
5. Spain, Francis J. 11 Wildwood Road	Vet. 88.00 73-01920	03/22/21	TP YY
	Medford		08/24/73
6. Makarewicz, Francis E. 1501 Edward Street	Vet. 83.04 73-04318	11/02/32	TP YY
	Lowell		08/24/73
7. Goode, Francis J. 4 Longspur Road	Vet. 82.60 73-03325	04/20/28	TP YY
	Chelmsford		08/24/73
8. Cagney, Maurice J. 10 Garfield Avenue	Vet. 82.16 73-05190	07/15/36	TP YY
	Beverly		08/24/73
9. Malloy, John B. 292 Pine Street	Vet. 78.24 73-03634	11/13/32	TP YY
	Fall River		08/24/73
10. Semrod, Theodore L. 311 South Street	94.88 73-05484	03/29/38	TP YY
	Carlisle		08/24/73
11. Feeney, Helen B. 1826 Lakeview Ave.	92.32 73-05477	12/09/21	TP YY
	Dracut		08/24/73
12. White, Joan C. 17 Alden Avenue	88.68 73-05715	10/08/30	TP YY
	Hull		08/24/73

13. Belinsky, Ruth 109 Wentworth Ave.	84.12	73-02082	10/01/23	TP	YY
14. Milot, Edmund R. 10 1/2 Waverly St.	83.92	73-02386	05/26/46	TP	YY
15. Chipman, Elizabeth A. 63 Edgewood Road	82.92	73-04137	03/20/32	TP	YY
16. Weinberg, John R.	80.32	73-05196	10/29/45	TP	YY

Lowell
Taunton
Wayland

Attachment C.

ELIGIBLE LIST

ESTABLISHED BY THE DIRECTOR OF CIVIL SERVICE

October 20, 1965

Administrative Assistant
(Massachusetts Historical Commission)
Department of the Secretary of the Commonwealth

Examination held April 24, 1965

9 women, 17 men examined

3 women, 1 man eligible as follows:

1. Richard D. Higgins, 7 Naples Rd., Salem	Dis. Vet.	78.08
2. Ann C. McCauliff, 2 Rollins Place, Boston		80.96
3. Claire R. Ross, 22 Ross Rd., Swampscott		79.00
4. Mary V. Darcy, 112 Decatur St., Arlington		78.08

EXHIBIT 84.

Summary of Official Service — Ten Year Comparative Table

NUMBER PASSING EXAMINATIONS								
Males			Females					Total
Year	Disabled Veterans	Veterans	Non-Veterans	Disabled Veterans	Veterans	Gold Star	Non-Veterans	
1973	143	2,635	3,155	1	92	2	13,494	19,524
1972	247	4,162	4,665	3	91	2	8,089	17,259
1971	188	3,886	3,013	3	146	6	9,062	16,304
1970	113	3,289	2,386	2	107	8	6,698	12,603
1969	284	4,063	2,202	1	94	-	6,186	12,830
1968	265	3,501	2,434	7	134	6	7,609	13,956
1967	309	3,957	3,362	3	165	2	8,476	16,274
1966	400	3,415	2,651	6	165	2	8,777	15,416
1965	335	3,411	3,531	5	148	2	9,825	17,257
1964	492	3,868	3,693	9	139	3	9,025	17,229

[Exhibits 85 — 168 are not reproduced by agreement of counsel.]

United States District Court. District of Massachusetts.

CAROL A. ANTHONY, ET AL.

v.

CIVIL ACTION
No. 74-5061-TTHE COMMONWEALTH OF
MASSACHUSETTS, ET AL.

HELEN B. FEENEY

v.

CIVIL ACTION
No. 75-1991-TTHE COMMONWEALTH OF
MASSACHUSETTS ET AL.

Judgment and Order.

March 29, 1976.

TAURO, D.J.

1. Judgment is entered in favor of the defendant in *Anthony v. Commonwealth*, CA 74-5061-T on grounds of mootness. (Opinion pages 16-23.)

2. Judgment is entered in favor of the Commonwealth of Massachusetts and the Division of Civil Service in *Feeney v. Commonwealth*, CA 75-1991-T, because these defendants are not "persons" within the meaning of 42 U.S.C. § 1983. (Opinion page 2 n. 2.)

3. Judgment is entered in favor of the plaintiff Feeney in No. 75-1991-T, against the Massachusetts Director of Civil

Service and the members of the Massachusetts Civil Service Commission on the grounds that Mass. Gen. Laws ch. 31, § 23 (The Massachusetts Veterans' Preference) is unconstitutional in that it operates to deprive female civil service applicants equal protection of the laws. (Opinion pages 23-37.)

It is ORDERED that:

(a) The Massachusetts Director of Civil Service and the members of the Massachusetts Civil Service Commission are hereby permanently enjoined from utilizing Mass. Gen. Laws ch. 31, § 23 in any future selection of persons to fill civil service positions with the Commonwealth.

(b) This injunction shall have no effect upon the continued status of any individual in a permanent civil service position who holds that position on the date of this injunction.

LEVIN H. CAMPBELL,
Circuit Judge.

JOSEPH L. TAURO,
District Judge.

United States District Court. District of Massachusetts.

CAROL A. ANTHONY, ET AL.

v.

CIVIL ACTION
No. 74-5061-T

THE COMMONWEALTH OF
MASSACHUSETTS, ET AL.

HELEN B. FEENEY

v.

CIVIL ACTION
No. 75-1991-T

THE COMMONWEALTH OF
MASSACHUSETTS, ET AL.

Opinion.

March 29, 1976.

TAURO, *District Judge.* These two actions are brought under 42 U.S.C. § 1983 by four female Massachusetts residents who claim they failed to receive Civil Service appointments with the Commonwealth due to the operation of the Massachusetts Veterans' Preference Statute,¹ Mass. Gen. Laws ch. 31, § 23, which they claim unconstitutionally discriminates against them because of their sex. They now seek to permanently enjoin the continued enforcement of § 23.

Temporary restraining orders, consented to by all parties, were entered in each case by a single judge of this court

¹ See Appendix.

prohibiting the defendants^{*} from making, or preparing to make, recommendations for positions sought by the plaintiffs pending the outcome of this litigation. See 28 U.S.C. § 2284(3). The parties in both actions submitted agreed statements of fact. The cases were consolidated for argument and then submitted for a decision on the merits.

I.

The Massachusetts Civil Service System covers approximately 60% of those employed by the Commonwealth. In the Classified Official Service, the division which includes the positions sought by the plaintiffs, 47,005 appointments (not including promotions) were made during the ten year period between July 1, 1963 through June 30, 1973. Forty-three percent (20,211) of those appointees were women while 57% (26,794)

^{*} Named as defendants in each case are the Commonwealth of Massachusetts; The Division of Civil Service of the Commonwealth of Massachusetts; Edward W. Powers, individually and in his capacity as the Director of Civil Service; Nancy B. Beecher, Wayne A. Healy and Helen C. Mitchell, individually and as members of the Massachusetts Civil Service Commission.

As the defendants correctly point out, neither the Commonwealth of Massachusetts nor the Division of Civil Service are "persons" within the meaning of § 1983 and, therefore, are not proper parties to any lawsuit brought under that section. *Gay Students Organization of University of New Hampshire v. Bonner*, 509 F. 2d 652 (1st Cir. 1974). See *Kenosha v. Bruno*, 412 U.S. 507 (1973); 365 U.S. 167 (1961). Nor have the parties stipulated to any facts which would permit the inference that \$10,000 or more is involved in any of the plaintiffs' claims, thereby allowing them to be maintained under 28 U.S.C. § 1331. The actions against those two defendants must therefore be dismissed.

We do not reach the question of whether the Eleventh Amendment also bars actions of this type from being maintained against the Commonwealth of Massachusetts or the Division of Civil Service. See *Edelman v. Jordan*, 415 U.S. 651 (1974).

were men. Of the women appointees, 1.8% (374) were veterans, while 54% of the men (14,476) had veteran status.

This overall 57-43 ratio of men to women in the Official Civil Service does not tell the whole story, however. A large percentage of female appointees serve in lower grade permanent positions for which males traditionally have not applied. Some females obtained civil service appointments through a now-defunct practice by which appointing authorities requested only female applicants for particular jobs from the Civil Service Division. Other females have been appointed from lists which did not include many veterans. Agreed Statements of Facts in *Anthony v. Commonwealth* [hereinafter *Anthony Statement*] ¶21; Agreed Statement of Facts in *Feeney v. Commonwealth* [hereinafter *Feeney Statement*] ¶20.

Employment security is an attractive feature of a permanent civil service appointment. An appointee chosen for such a position, who successfully completes a six-month probationary period, receives essentially permanent tenure. Mass. Gen. Laws ch. 31, § 20D. Such appointee cannot be discharged except for cause, and is statutorily entitled to a hearing at which the basis for dismissal may be challenged. Mass. Gen. Laws ch. 31, § 43.

The first step toward obtaining a permanent civil service appointment is the taking of an examination administered by the Civil Service Division. The examination is designed to measure an applicant's relative ability and fitness for the particular position he seeks. For certain positions an "unassembled examination" is administered, consisting merely of assigned scores based upon an applicant's training and experience. For other positions, an applicant is required to take a written test, the results of which will serve as one element in a composite score reflecting an evaluation of the applicant's training and experience.

Once an applicant passes the examination, he becomes an "eligible" and is placed on an "eligible list." Those on the eligible list are then ranked as follows under a formula which is the basis for plaintiffs' complaint:

1. Disabled veterans in order of their composite scores.
2. Other veterans in order of their composite scores.
3. Widows and widowed mothers of veterans in order of their composite scores.
4. All other eligibles in order of their composite scores.

Mass. Gen. Laws ch. 31, § 23.

The Veterans' Preference provided in § 23 is, therefore, an integral part of the selection process. Although a veteran must achieve a passing test grade, an eligible non-veteran can never be placed ahead of a veteran, regardless of how superior his test score might be. As a practical matter, therefore, the Veterans Preference replaces testing as the criterion for determining which eligibles will be placed at the top of the list.³

Whenever a state agency needs to fill a Civil Service vacancy, it notifies the Civil Service Division. The Civil Service Director then "certifies" several candidates for appointment from the top of the appropriate eligible list, in ratios set forth in various administrative regulations, by sending those names to the appointing authority. In most instances, more names are certified for appointment than there are vacancies

³ As noted, within the category of veterans, the statute provides an additional preference for disabled veterans and within the category of non-veterans, the statute provides a preference for widows and mothers of veterans. The parties have not submitted data on the number of individuals who come within these two sub-categories, nor does it appear that their presence has any impact on the plaintiffs' basic contentions. *But see Hutcheson v. Director of Civil Service*, 361 Mass. 480, 281 N.E. 2d 53 (1972).

in order to give the appointing authority a measure of discretion in the actual hiring decision. The appointing authority is required to make the appointment from among the names so certified, but is not required to appoint the person highest on the list. Feeney Statement ¶9.

A full eligible list remains in effect for a maximum of two years, except when no eligibles remain available for appointment before the expiration of that period, or when a new examination is given for a position during the two year effective period of an eligible list. In the latter instance, the remaining eligibles on the prior list are integrated into the new list in order of their composite scores within each preference category. All eligibles who have attained a particular composite score within a preference category must be included among the eligibles certified for appointment. For example, should the Director, in accordance with a given regulation, certify that the five highest scores were 95 to 99, there might well be a number of eligibles who scored within that range. All would be certified.

II.

This Civil Service appointment scheme, subject as it is to the Veterans' Preference formula, is affected in its practical impact by a number of federal statutes and regulations which have limited sharply the opportunity for women to serve in the armed forces. Indeed, the percentage of females in the Official Civil Service who are also veterans (1.8%), is a reflection of the fact that, during most of the post-World War II period, no more than 2% of the armed forces personnel could be women. *See, e.g.*, 32 C.F.R. § 580.4(b). It is not surprising, therefore, that, currently only 2% of Massachusetts veterans are women. Feeney Statement ¶31.

Historically, women were excluded from the military until 1918 when approximately 10,000 were allowed to enlist in the

Navy. After World War I, these volunteer groups were disbanded. Thereafter, until 1942, only nurses were allowed to enlist. Feeney Statement ¶35. From 1948 until 1967, women were prohibited from making up more than 2% of the total personnel in the armed forces.⁴ The Army, the largest branch of the nation's armed services, still maintains a 2% limitation by regulation. 32 C.F.R. § 580.4(b).

Apart from these absolute limitations, various enlistment and appointment criteria have, until recently, been more stringent for women than for men. A man may enlist at age 17. But, until 1967, women were statutorily barred until age 18. 10 U.S.C. § 505 *as amended* by Act of May 24, 1974, Pub. L. No. 93-290 § 1, 88 Stat. 173 Joint Anthony/Feeney Exhibits 100-04 [hereinafter J. Exhs.]. Parental consent was required of women under 21. For men, the age was 18. Feeney Statement ¶38. Moreover, women seeking enlistment have been subject to higher mental aptitude test score requirements and more rigorous physical requirements than men, as well as more extensive application and screening procedures, including requirements for personal references and attractive appearance. J. Exhs. 93, p. 14, 99, 100-04, 107-10, 123, 154. Until recently, the armed services prohibited the enlistment and appointment of married women and women with children less than 18 years of age, while similarly situated men were not so excluded. Feeney Statement ¶38; J. Exhs. 98, 99, p. 2, 103, 104. And, of course, women have always been ineligible for the draft.

⁴ 10 U.S.C. § 3209, *repealed by* Act of November 8, 1967, Pub. L. No. 90-130 § 1(9)(e), 81 Stat. 375; 10 U.S.C. § 3215, *repealed by* Act of November 8, 1967, Pub. L. No. 90-130 § 1(9)(H), 81 Stat. 375; 10 U.S.C. § 5410, *repealed by* Act of November 8, 1967, Pub. L. No. 90-130 § 1(16), 81 Stat. 376; 10 U.S.C. § 8208 *repealed by* Act of November 8, 1967, Pub. L. No. 90-130, § 1(26)(c), 81 Stat. 382; 10 U.S.C. § 8215, *repealed by* Act of November 8, 1967, Pub. L. No. 90-130, § 1(26)(E), (F), 81 Stat. 382.

Nothing in the Massachusetts scheme prohibits women from competing for civil service positions. But the practical consequence of the operation of these federal military proscriptions, in combination with the Veterans Preference formula is inescapable. Few women will ever become veterans so as to qualify for the preference; and so, few, if any, women will ever achieve a top position on a civil service eligibility list, for other than positions traditionally held by women.

The plaintiffs contend that this consequence has effectively deprived them of an opportunity to compete for the most attractive positions in the state civil service. They maintain that such an absolute and permanent negative impact on the opportunities of women to obtain significant public employment consistent with their qualifications violates the equal protection clause of the Fourteenth Amendment. It is to these specific contentions that we now turn.

III.

A.

The Anthony Case.

The plaintiff Carol A. Anthony, is a female resident of Massachusetts, admitted to practice law here. She is a provisional appointee to a counsel position in the Massachusetts Department of Public Welfare. On January 9, 1974, she applied to take an announced unassembled examination for appointment to the permanent position of Counsel I. Her qualifications were rated in May 1974 and Ms. Anthony received a grade of 94, which tied her for the highest score received by any applicant. But, when the eligible list of applicants was established on October 25, 1974, Ms. Anthony, a non-veteran, was not ranked at the top of the list. Instead, she was ranked 57th behind 56 veterans, all of whom were

men and 54 of whom had lower scores than she on the examination. Since new applications were continuously accepted and processed, Ms. Anthony claims that the names of 20 additional veterans who applied for the positions after she did (all of whom were men and 19 of whom received lower scores) were then integrated into the list ahead of her, reducing her eventual position on the list to 77th.

The parties have stipulated that, but for the restraining order entered in the *Anthony* case on November 4, 1974, the defendants would have begun the certification process, and that Ms. Anthony would not have been certified for any of the 19 permanent Counsel I positions which had by that time been requisitioned. Anthony Statement ¶ 15. Given her position on the list, defendants concede that it is unlikely that Ms. Anthony would have been reached for certification for any subsequent counsel vacancy.

If, on the other hand, the Counsel I list had been established by ranking eligibles in the order of their examination grades, without application of the Veterans' Preference formula, Ms. Anthony would have been among the first considered for appointment to permanent Counsel I positions. Solely because of defendants' application of the Veterans' Preference Statute, therefore, Ms. Anthony's position on the list was reduced from a tie for first place to at least 57th. She claims she was thereby effectively deprived of an equal opportunity to be considered for appointment to a permanent Counsel I position. Anthony Statement ¶¶ 9-13, 15, 16, 29; Feeney Statement ¶¶ 9-18; Anthony Exhs. 2, 3, 81; Feeney Exhs. 9, 11; Appendix A.

Plaintiff Kathryn Noonan is also a female resident of Massachusetts, admitted to practice law here. In early 1974, Ms. Noonan applied for a counsel position at the Labor Relations Commission. She was informed by its Chairman that a state-wide examination for the position was imminent and that,

as a result of the Veterans' Preference Statute, her status as a non-veteran gave her little chance of being considered for permanent appointment to the position. Moreover, any interim, provisional appointment as a counsel which she might receive would be terminated after the certification of a veteran. Ms. Noonan was instead offered, and accepted, a provisional appointment to the position of Labor Relations Examiner with the Labor Relations Commission since no state-wide examination for that position was pending. Although she assumed the duties and responsibilities of a counsel, she had the title of an examiner and received the pay for that position which is of a lower grade and pay than a Counsel I position.

Ms. Noonan, however, also took the Counsel I unassembled examination in May 1974. She eventually received a grade of 94, which was the highest grade received by any applicant. Like Ms. Anthony, Ms. Noonan was not ranked at the top of the eligible list for the Counsel I position, but was instead ranked with Ms. Anthony behind at least 56 veterans, all of whom were men and 54 of whom received lower grades on the examination.

But for the entry of the restraining order, the parties agree that Ms. Noonan, like Ms. Anthony, would not have been certified for any of the 19 Counsel I positions then available and would not have been considered for any Counsel I position. If, on the other hand, the Counsel I list had been established by ranking eligibles in the order of their examination grades, without application of the Veterans' Preference formula, Ms. Noonan would have been certified and placed among the first group considered for appointment to permanent Counsel I positions. Indeed, she was told by the Chairman of the State Labor Relations Commission in late 1974 that she would have been recommended for such an appointment. Ms. Noonan's position on the list was substantially reduced,

and she was deprived of these opportunities for appointment to a Counsel I position in 1974, solely because of defendants' application of the Veterans' Preference Statute. Anthony Statement ¶¶ 9-14, 15-17, 29; Feeney Statement ¶¶ 9-18; Anthony Exhs. 2, 3, 82, 84; Feeney Exhs. 9, 11; Appendix A.

The plaintiff Betty A. Gittes is a female resident of the Commonwealth and maintains a private law practice here. She is not a veteran. In early 1974, Ms. Gittes applied for a permanent appointment to a Counsel I position. She received a grade of 92 on the unassembled examination, which tied her for the second highest score received by any applicant. Instead of being ranked near the top of the eligible list by virtue of her examination grade, however, Ms. Gittes was ranked 103rd, behind, among others, 76 veterans, all of whom were men and 64 of whom received lower grades on the examination than she. Like her co-plaintiffs, Ms. Gittes would not have been certified for any of the 19 Counsel I positions which were available and would not have been considered for any Counsel I position. Had the list been established by ranking eligibles in order of their examination grades and without application of the Veterans' Preference Statute, however, Ms. Gittes would have been among the first group of people considered for appointment to permanent Counsel I positions. Anthony Statement ¶¶ 9-13, 15, 16, 29; Feeney Statement ¶¶ 9, 18; Anthony Exhs. 2, 3, 83; Feeney Exhs. 9, 11; Appendix A.

B.

The Feeney Case.

The plaintiff Helen B. Feeney is a female resident of the Commonwealth, and is not a veteran. She has been a long-

time employee of the Commonwealth, having served in the Civil Defense Agency from 1963 to 1967 as a Senior Clerk Stenographer and from 1967 to 1975 as Federal Funds and Personnel Coordinator.

Mrs. Feeney's experience with Civil Service examinations has been extensive. On February 6, 1971, she took an examination for the single position of Assistant Secretary, Board of Dental Examiners. Although she received the second highest grade of 86.68 on the examination, the application of the Veterans' Preference formula caused her to be ranked sixth on the list behind five veterans, all of whom were male and four of whom received lower grades. She was not certified and a male veteran with an examination grade of 78.08 was appointed.

On February 24, 1973, Mrs. Feeney took an examination for the single position of Head Administrative Assistant, Solomon Mental Health Center. Although she received a grade of 92.32, which was the third highest grade on the examination, the application of Veterans' Preference formula caused her to be ranked 14th on the list behind 12 veterans, all of whom were men and 11 of whom had lower examination grades than she. But for the application of the Veterans' Preference, Mrs. Feeney would have been certified as eligible for the position. Instead, she was not certified.

On or about May 18, 1974, Mrs. Feeney took an examination for positions classified as Administrative Assistant. Although she received an examination grade of 87, which would have tied her for 17th place on the list, the Veterans' Preference formula caused her to be ranked 70th behind 64 veterans, 63 of whom were men and 50 of whom had lower examination grades. Although no appointments to any of the seven positions requisitioned from this list (or to any of the 36 other positions now filled by provisionals) have yet been made because of this court's outstanding temporary restraining order,

Mrs. Feeney's opportunity to be considered for appointment to any of these positions has been substantially diminished because of the application of the Veterans' Preference formula. Anthony Statement ¶¶ 9, 18, 19; Feeney Statement ¶¶ 10, 17, 27; Anthony Exhs. 5, 8; Feeney Exhs. 2, 4, 7, 61, 82; Appendices B, C.

On March 28, 1975, Mrs. Feeney was laid off from her position with the Commonwealth's Civil Defense Agency and has since been unemployed. Feeney Exhibit 82.

IV.

A threshold legal question is whether there remains a live controversy between the plaintiffs in the *Anthony* case and the defendants named in that action.

On April 17, 1975, the Massachusetts legislature enacted ch. 134 of the Acts of 1975, amending Mass. Gen. Laws ch. 31, § 5.⁵ The amendment, which became effective on

⁵ Mass. Gen. Laws ch. 31, § 5 now provides:

No rule made by the [Civil Service] commission shall apply to the selection or appointment of any of the following:

counselors, attorneys-at-law, including attorneys designated as counsel or counsellors-at-law, city solicitors, assistant solicitors, town counsels and assistant town counsels (new language emphasized).

Section 2 of the 1975 amending statute then provides:

SECTION 2. The provisions of section five of chapter thirty-one of the General Laws, as amended by section one of this act, shall not impair the civil service status of any person holding employment on a permanent basis on the effective date of this act.

July 16, 1975, removed all appointments for state and municipal legal positions made after its effective date from the provisions of the state civil service law. Thus, the positions sought by the three plaintiffs in the *Anthony* case are no longer subject to the Veterans' Preference. Accordingly, the defendants now claim that the *Anthony* case is moot.

Although the *Anthony* plaintiffs did present a justiciable claim at the outset of the litigation, the "case or controversy" limitation of Article III requires "an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975), quoting *Steffel v. Thompson*, 415 U.S. 452, 459 n. 10 (1974). See *DeFunis v. Odegaard*, 416 U.S. 312 (1974); *Britt v. McKenney*, ____ F. 2d ____ (1st Cir. 1976); *Marchand v. Director, U.S. Probation Office*, 421 F. 2d 331, 332 (1st Cir. 1970). The doctrine of mootness is designed to shield the federal courts from rendering advisory opinions on what the law should be, or being drawn into disputes not affecting the rights of the litigants who are before them. *North Carolina v. Rice*, 404 U.S. 244, 246 (1971). Cf. *Warth v. Seldin*, 422 U.S. 490, 499 n. 10 (1975). The question in each case, therefore, is whether there is a substantial controversy between parties of sufficient immediacy and reality which would allow a court to grant specific relief through a decree of conclusive character. *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227, 240-41 (1937). In the *Anthony* case, this question must be answered in the negative.

In 1974, when this action was originally brought, the likelihood of the *Anthony* plaintiffs obtaining appointment to Counsel I, or any legal position covered by Civil Service, was unquestionably affected by the Veterans' Preference. Even though the *Anthony* plaintiffs had all received high scores on the unassembled examination they were faced with a situation where veterans with lower scores would have preceded them

on any certification list. Before the Director of Civil Service established a certification list for Counsel I positions, however, this court entered a temporary restraining order prohibiting him from either establishing an eligible list for Counsel I or making any certification of persons qualified for those positions to the appointing agencies. That action prevented any harm to the plaintiffs from the operation of the Veterans' Preference between the time they took the exam and the effective date of ch. 134.

Now, with Civil Service requirements no longer applicable to these counsel positions, appointing authorities are free to consider the plaintiffs without regard to the Veterans' Preference formula. Accordingly, the relief which the *Anthony* plaintiffs ultimately sought in the courts has now been accorded them through legislation, thereby resolving their underlying complaint.

But the plaintiffs oppose a conclusion of mootness, claiming they were injured by the very compilation of an eligible list in October 1974, on which they were ranked too low even to be certified to an appointing agency, and that the effects of that original injury remain. If the selection process operated as they allege it should have, and the Veterans' Preference did not distort the ranking of eligibles, they maintain they undoubtedly would have been certified and *chosen* for permanent positions by now. Accordingly, they argue that their rights can only be restored by an order requiring that they be considered for appointment now, as they should have been considered late in 1974, and, if they are appointed and successfully complete their probationary periods, that they hold their positions with all the protections of the Civil Service Laws as if appointed in late 1974.

This argument misconstrues the operation of the civil service selection process. A high score on the civil service exam, and resulting certification to an appointing agency, is not and

never has been a guarantee of selection. Had there been no Veterans' Preference when the Counsel I eligible list was compiled in 1974, the *Anthony* plaintiffs were assured only of being *considered* for the various vacancies which arose while the list remained in force. The only cognizable injury the *Anthony* plaintiffs suffered by virtue of the Veterans' Preference was being removed from consideration for Counsel I positions. The enactment of ch. 134 now restores precisely that opportunity to them. Their claim for seniority rights dating back to 1974, therefore, is too speculative to breathe life into an otherwise dead issue between the parties. Cf. *Golden v. Zwickler*, 394 U.S. 103 (1969).

To be sure, a Counsel I position today has a slightly different job description than it had in October 1974. Removal of the position from civil service protection means that individuals now appointed do not have "tenure" or the statutory right to a hearing upon discharge. Anyone appointed as a Counsel I, therefore, is subject to a risk not present in October 1974.

The *likelihood* of future injury may, on occasion, serve as a basis for allowing a claim to be maintained even though it may appear at first blush to be moot. See *Super Fire Engineering Co. v. McCorkle*, 416 U.S. 115 (1974); *Roe v. Wade*, 410 U.S. 113, 125 (1973); *Moore v. Ogilvie*, 394 U.S. 814 (1969). But, in this case, any future loss due to the removal of civil service protection, amounts to the *possible* loss of tenure and hearing rights in the event of dismissal. This claim is, at most, incidental to the plaintiffs' attack on the Veterans' Preference and its effect on the initial selection process. Moreover, even if it were somehow related to the plaintiff's complaint, the potential injury resulting from the loss of civil service protection depends upon the occurrence of a chain of events — the plaintiffs' obtaining permanent civil service status, their being discharged and being deprived of a hearing

— which are wholly speculative and now so remote that they do not present any tangible prejudice to any existing interests the plaintiffs may have. See *Preiser v. Newkirk*, 422 U.S. 395, 402-03 (1975); *North Carolina v. Rice*, 404 U.S. 244, 246 (1971); *Hall v. Beals*, 396 U.S. 45 (1969). Cf. *O'Shea v. Littleton*, 414 U.S. 488 (1974); *Laird v. Tatum*, 408 U.S. 1 (1972).

The *Anthony* plaintiffs also claim there is still a likelihood of future harm because they remain interested in non-legal civil service positions which are still covered by the civil service law. Yet, prior to the adoption of ch. 134, the *Anthony* plaintiffs had never clearly indicated such an interest and, indeed, had specifically directed their challenge to the effect of the Veterans' Preference on their opportunities to be considered for Counsel I positions. Moreover, the record does not indicate that they have applied for any other jobs, that they are qualified to hold any other civil service positions, or that the selection process for those positions is affected to the same degree as it allegedly is for the positions they originally sought. To allow the *Anthony* plaintiffs to shift the focus of this case now, and maintain an action because there exists the possibility that they may someday apply for other civil service positions, and might in such an event be deprived of fair consideration because of the operation of the Veterans' Preference, would require us to deal with a controversy which simply does not and may never exist. This we decline to do.

Finally, the *Anthony* plaintiffs maintain that since they have each claimed damages of one dollar their action is still alive. This claim is without merit. Where courts proceed to hear otherwise moot cases because of a claim for damages, that claim is invariably a substantial one, see, e.g., *Stanton v. Stanton*, 421 U.S. 7, 11 (1975), hotly contested by the parties. *Powell v. McCormick*, 395 U.S. 486, 497-98 (1969). In this case, the plaintiffs made no claim for damages until the

enactment of ch. 134, and they concede that the prayer is only a nominal one. Under these circumstances, the damage claim is clearly incidental to the relief sought and, therefore, cannot properly be the basis upon which the court could find the *Anthony* claim justiciable. *Kerrigan v. Boucher*, 450 F. 2d 487, 489-90 (2d Cir. 1971).⁶

Accordingly, this court holds that the claims brought by the three plaintiffs in the *Anthony* case are now moot. We therefore proceed to the merits of the *Feeney* case alone.

V.

A state cannot, without justification, classify its citizens by imposing unequal burdens or awards on otherwise equally situated individuals. In cases involving alleged sex discrimination, the majority position on the Supreme Court would seem to permit a classification based on sex only as long as it was founded on a "convincing factual rationale" which goes beyond "archaic and overbroad generalizations" about the roles of men and women. *Fortin v. Darlington Little League, Inc.*, 514 U.S. 344 (1st Cir. 1975). See *Stanton v. Stanton*, 421 U.S. 7 (1975); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Schlesinger v. Ballard*, 419 U.S. 498 (1975); *Geduldig v. Aiello*, 417 U.S. 484 (1974); *Kahn v. Shevin*, 416 U.S. 351

⁶ The *Anthony* plaintiffs do not claim that the legislature is likely to reverse its decision to voluntarily remove Counsel I positions from the requirements of civil service, see, e.g., *United States v. W. T. Grant Co.*, 345 U.S. 629 (1953), or that controversies of this type are usually so quickly overtaken by events that the issues raised by the *Anthony* plaintiffs are "capable of repetition, yet evading review." See, e.g., *Roe v. Wade*, 410 U.S. 113, 125 (1973); *Moore v. Ogilvie*, 394 U.S. 814 (1969). Cf. *Cicchetti v. Lucey*, 514 F. 2d 362 (1st Cir. 1975).

(1974); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Reed v. Reed*, 404 U.S. 71 (1971).⁷

The Massachusetts Veterans' Preference was not enacted for the purpose of disqualifying women from receiving civil service appointments. Theoretically, women are not barred from qualifying as preferred veterans. Yet, the formula's impact, triggered by decades of restrictive federal enlistment regulations, makes the operation of the Veterans' Preference in Massachusetts anything but an impartial, neutral policy of selection, with merely an incidental effect on the opportunities for women. See, e.g., *Castro v. Beecher*, *supra*; *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973). Nor under the circumstances, can the operation of this formula be viewed as an effort by the Commonwealth to set priorities among competing claims for finite state resources. *Jefferson v. Hackney*, 406 U.S. 535 (1972); *Dandridge v. Williams*, 397 U.S. 471 (1970); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).⁸

⁷ Our view of the merits makes it unnecessary to consider the plaintiff's position that sex-based classifications are suspect or that the Veterans' Preference deprives the plaintiffs of a fundamental right, requiring the state to come forward with a showing that the Veterans' Preference is supported by a "compelling interest" in order for it to be sustained. See *Feinerman v. Jones*, 356 F. Supp. 252, 256-59 (M.D. Pa. 1973); *Koelfgen v. Jackson*, 355 F. Supp. 243, 250 (D. Minn. 1972), *aff'd mem.* 410 U.S. 976 (1973).

⁸ This case, therefore, is distinguishable from *Geduldig v. Aiello*, 417 U.S. 484 (1974). There, the California disability insurance program was attached because it did not cover expenses incurred as the result of a normal pregnancy, and in so doing placed a disproportionate burden on women. In finding such a limitation on benefits constitutional, the Court noted that the program was financed through a carefully balanced scheme of payroll deductions which did not draw upon general revenues. A requirement that insurance coverage be extended to normal pregnancies which could have cost an additional hundred million dollars, might well have disrupted the program's finances and placed additional burdens on taxpayers and beneficiaries. Under these circumstances, the Court held that the Constitution did

Rather, the Veterans' Preference formula is a deliberate, conscious attempt on the part of the state to aid one clearly identifiable group of its citizens, those who qualify as veterans, by giving them an absolute and permanent preference in public employment. Clearly, the rewarding of those who have rendered public service as members of the military is a worthy state purpose. But, equally as clear is that the means employed by the Commonwealth for achieving that purpose, the preference formula, succeeds at the absolute and permanent disadvantage of another clearly identifiable group, Massachusetts' women.

The pivotal question before us, therefore, is, given the legitimate state purpose of assisting veterans, does the means by which Massachusetts implements that purpose in the area of public employment unconstitutionally deprive women of their equal protection rights under the Fourteenth Amendment. Our answer is that it does and, therefore, that ch. 134 § 23 is unconstitutional.

Massachusetts, like other states, and like the federal government, has consistently provided preferential treatment in public employment to those who have served in the nation's armed forces. See, e.g., Pa. Stat. Ann. tit. 51 § 492.2 *et seq.* See also 5 U.S.C. §§ 2108, 3309-12, 3316. The modern Veterans' Preference Statute has its roots in legislation enacted

not prohibit the state from making a policy judgment to limit premiums and taxes by limiting coverage. Nowhere did the Court hold that *any* state program which had a disproportionate impact on the interests of women would be constitutional or that *any* statute which provided preferential treatment to one class at the expense of another was permissible under the Fourteenth Amendment. In particular *Geduldig* is distinguishable because the class of persons excluded does not consist of all or virtually all women but only pregnant women.

in the seventeenth century⁹ and represents a key phase of the Commonwealth's continuing efforts on behalf of veterans.¹⁰ The program is designed to encourage service in the armed

⁹ The first veterans' benefit enacted in this country seems to have been a pension provided by the Plymouth Colony in 1636. *Laws of the Colony of New Plymouth* [1636] reprinted in *The Compact with the Charter and Laws of the Colony* 44 (1836). The original public employment preference for veterans was enacted in 1884, Act of June 3, 1884, ch. 320 [1884] Mass. Acts and Resolves 346, and since that time has had what the Supreme Judicial Court has called a "troubled history." *Hutchinson v. Director of Civil Service*, 361 Mass. 480, 482, 281 N.E. 2d 53, 54 (1972). See, e.g., *Commissioner of the Metropolitan District Commission v. Director of Civil Services*, 348 Mass. 184, 203 N.E. 2d 95 (1964); *Mayor of Lynn v. Commissioner of Civil Service*, 269 Mass. 410, 169 N.E. 502 (1929); *Phillips v. Metropolitan Park Commission*, 215 Mass. 502, 102 N.E. 717 (1913); *Opinion of the Justices*, 166 Mass. 589, 44 N.E. 625 (1896); *Brown v. Russell*, 166 Mass. 14, 43 N.E. 1005 (1896); Note, *Preference of Veterans in the Massachusetts Civil Service*, 10 Harv. L. Rev. 236 (1896).

In recent years both private interest groups and legislative committees have proposed changes in the Veterans' Preference. See, e.g., League of Women Voters of Massachusetts, *The Merit System in Massachusetts* (1961); Mass. S. Doc. No. 1060, 34-35; Mass. H. Doc. No. 5100 (1967). Contrary to the defendants' assertions, however, the continuing public debate on the economic and social ramifications of reform of the Massachusetts Veterans' Preference does not affect our responsibility to examine the constitutionality of the current scheme.

¹⁰ The special treatment Massachusetts accords veterans in civil service selection is part of an extensive scheme of state aid to veterans. These benefits include exemptions from license fees, e.g., Mass. Gen. Laws ch. 101, § 24, ch. 175, § 167A, exemption from motor vehicle registration fees, Mass. Gen. Laws ch. 90, § 33, preferences for certain low rent and state funded housing projects, Mass. Gen. Laws ch. 121B, §§ 77, 32(f), 34, exemption from tuition for summer sessions, evening classes, extension and correspondence courses at state colleges and universities, Mass. Gen. Laws ch. 73, § 8A; ch. 69, §§ 7, 7A, and certain retirement benefits. Mass. Gen. Laws ch. 32, §§ 253, 56-58B. See also Committee on Rules of the Two Branches. A Compilation of the Laws Relating to Veterans and Two Branches. A Compilation of the Laws Relating to Veterans and Their Organizations (1974).

services, reward those whose lives have been disrupted because they have served, and provide some assistance during the sometimes uneasy transition from military to civilian life.

Nothing in the Fourteenth Amendment prohibits Massachusetts from providing special treatment to veterans in considering candidates for public employment.¹¹ *Rios v. Dillman*, 499 F. 2d 329 (5th Cir. 1974); *Feinerman v. Jones*, 356 F. Supp. 252 (M.D. Pa. 1973); *Koelfgen v. Jackson*, 355 F. Supp. 243 (D. Minn. 1972), *aff'd mem.* 410 U.S. 976 (1973). Such a policy responsibly recognizes both the special problems of veterans and the need to promote an important aspect of the nation's welfare.

But the worthy purpose of a legislative program is not enough to shield its method of implementation from judicial scrutiny, especially in the face of a challenge based on the Equal Protection Clause. In the context of the Fourteenth Amendment, "[t]he result, not the specific intent is what matters." *Rozecki v. Gaughan*, 459 F. 2d 6, 8 (1st Cir.

¹¹ The recent cases in which courts have had occasion to sanction the policies behind the Veterans' Preference in the face of attacks based on the Fourteenth Amendment have not involved the type of challenge presented in this case. In neither *Rios v. Dillman*, 499 F. 2d 329 (5th Cir. 1974) nor *Koelfgen v. Jackson*, 355 F. Supp. 243 (D. Minn. 1972), *aff'd mem.* 410 U.S. 976 (1973) did the court consider whether the statutes involved in those cases discriminated against women. In *Feinerman v. Jones*, 356 F. Supp. 252 (M.D. Pa. 1973), where the Pennsylvania preference was challenged on grounds of sex discrimination, the statute involved there provided for a point-bonus system, as opposed to an absolute and permanent preference for veterans. The court held that on the record presented in that case the plaintiff had not demonstrated that the particular statute challenged operated in a discriminatory way. See also *Russell v. Hodges*, 470 F. 2d 212, 218 (2d Cir. 1972); *White v. Gates*, 253 F. 2d 868 (D.C. Cir.), *cert. denied*, 356 U.S. 973 (1958); *People ex rel. Sellers v. Brady*, 262 Ill. 578, 105 N.E. 1 (1914); *Goodrich v. Mitchell*, 68 Kan. 765, 75 P. 1034 (1904); *State ex rel. Kangas v. McDonald*, 188 Minn. 157, 246 N.W. 900 (1933); *Commonwealth ex rel. Graham v. Schmid*, 333 Pa. 568, 3 A. 2d 701 (1938).

1972); *Boston Chapter, N.A.A.C.P., Inc. v. Beecher*, 504 F. 2d 1017, 1021 (1st Cir. 1974) *cert. denied*, 421 U.S. 910 (1975). See, e.g., *Taylor v. Louisiana*, 419 U.S. 522 (1975); *Griffin v. Illinois*, 351 U.S. 12 (1956); *Smith v. Allwright*, 321 U.S. 649 (1944); *Guinn v. United States*, 238 U.S. 347 (1915). As Judge Wright has noted: "[t]he arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme." *Hobson v. Hansen*, 269 F. Supp. 401, 497 (D. D.C. 1967), *aff'd sub nom. Smuck v. Hobson*, 408 F. 2d 175 (D.C. Cir. 1969) (en banc).

It is not enough that the prime objective of the Veterans' Preference statute, that of aiding those who have served in our nation's armed forces, is legitimate and rational. The means chosen by the state to achieve this objective must also be legitimate and rational. For a court to examine the means of implementation as well as the purpose of a legislative program is not to second-guess the legislature as to what might have been a more effective or preferable course. Rather, by examining the impact on others of a programmatic effort by the state to intentionally benefit one identifiable segment of its population, this court exercises its fundamental responsibility to ensure that all citizens are treated equally and fairly under the law.

The practical effect of Veterans' Preference is clear. Eligible veterans, regardless of qualifications relative to eligible non-veterans, have the public employment field cleared for them on an absolute and permanent basis. The argument that the preference program is somehow related to job qualifications or performance is specious. For each civil service position, the state normally provides selection criteria related to the demands of the particular job. The Veterans' Preference is in no way based on such criteria. On the contrary, it suspends the application of these job-related criteria and

substitutes a formula that relegates demonstrable professional qualifications to a secondary position, absolutely and permanently.

The negative impact that this absolute preference has on women is dramatic. The list of nineteen eligibles for the Head Administrative Assistant vacancy sought by Mrs. Feeney at the Solomon Mental Health Center included four women. But for the application of the preference, plaintiff Feeney would have ranked third on the list and would have been among the first set of eligibles considered for the position. Application of preference, however, relegated Mrs. Feeney to 14th (behind 12 male veterans, 11 of whom received lower scores than she did) and, as a result, she was not certified for consideration for the position.

Of the four women on the list, none obtained the preference (0%), while 12 of the 15 men (80%) did achieve preferred status. Moreover, in relative terms, the 12 veterans gained an average of four places, while the four women lost an average of seven. But for the application of the Veterans' Preference, three of the four women on the list would have been ranked in the top 12 places. Because of the preference, those places were totally occupied by male veterans.

The same pattern is also evident in the much larger Administrative Assistant list which served as a pool for numerous positions in state government. Plaintiff Feeney, whose test score would have put her within the top twenty positions, ranked 70th on the list behind 52 veterans with lower scores and 12 veterans with the same or higher scores. Of the 41 women on the list, 37 were ranked below male veterans who received lower scores than they did; one qualified for the preference (2.5%) while 63 of the 135 men (47%) did so. These 41 women lost an average of 21.5 places each while 63 male veterans gained an average of 28 places each. If the list had been compiled without the Veterans' Preference, nearly 40%

of the women would have occupied the top third of the list which is now occupied, with one exception, by men.

The phenomenon illustrated in the lists on which Mrs. Feeney was named is not an aberration. The parties have submitted fifty eligible lists in both the *Anthony* and *Feeney* cases, compiled chiefly from 1971 through 1975. *Anthony* Exhs. 11-60; *Feeney* Exhs. 13-62. In every one, the application of the Veterans' Preference, in significant fashion, causes men to gain places at the expense of women. Moreover, of the approximately 500 men and 1200 women represented on the lists, 38% of the men are veterans while only 0.6% of the women are veterans. And in each of the lists, one or more female eligibles were placed behind male veterans with lower scores and were thereby deprived of certification opportunity which, otherwise, they would have had.

To be sure, 43% of the permanent appointments in a ten year period from 1963 to 1973 have been women (even though 56% of the women who took civil service examinations in that 10 year period passed). Yet, a closer examination of those figures reveals, as is conceded by all parties, that the female appointees are generally clerks and secretaries, lower-grade and lower-paying positions for which men traditionally have not applied. Few, if any, females have ever been considered for the higher positions in the state civil service.

Women's lack of success in obtaining significant state employment has no relation to any objective standard of assessing qualifications. Rather, the percentage of female civil service appointees is inescapably tied to circumstances totally beyond their control, or choice — the federal government's policy of limiting the number of women who may serve in the armed forces. In practical application, the combination of federal military enrollment regulations with the Veterans' Preference is a one-two punch that absolutely and permanently

forecloses, on average, 98% of this state's women from obtaining significant civil service appointments.

Whatever their merit¹² in terms of military priorities, it is clear that federal military enlistment regulations make it unlikely that a woman will serve in the armed forces and, thereby, become eligible for the Massachusetts Veterans Preference. Facially, the Veterans' Preference is open to both men and women. But to say that it provides an equal opportunity for both men and women to achieve a preference would be to ignore reality. By making status as a veteran the *sine qua non* for obtaining the most attractive positions in the state civil service, Massachusetts has effectively and unquestioningly incorporated into its public employment policy a set of criteria having no demonstrable relation to an individual's fitness for civilian public service. By doing so it has caused disastrous negative consequences for the employment opportunities of women, a clearly identifiable segment of the Commonwealth's population entitled to fair and equal protection under the law.

Despite its troublesome impact on the women of this Commonwealth, the operation of the Massachusetts Veterans' Preference might escape constitutional rejection if it were the only means by which the state could implement a program of veterans assistance in the area of public employment. But, the fact is that there are alternatives available to the state to achieve its purpose of aiding veterans, without doing so at the singular expense of another identifiable class, its women.

For example, a point system could be established designed to offer some reward for length of service in the armed services and/or to recognize particular abilities and skills likely to have

¹² We express no opinion on the constitutionality of this series of statutes and regulations affecting the opportunities of women in the armed services.

been acquired as a result of military service.¹³ A time limit for exercising the preference could also be established so as to tailor its use to those who have shortly returned to civilian life. Such approaches would not *absolutely* and *permanently* disadvantage the women of this Commonwealth to the advantage of a male veteran. Of course, the constitutionality of any such alternatives are not now before us. Nor by mentioning them do we assume the role of a super-legislature. We point out such alternatives only to indicate that Massachusetts has considerable flexibility in the manner in which it can aid its veterans, without doing so at the absolute and permanent expense of its women.

While there is no constitutional right to public employment, once a state decides to provide public service jobs, the Fourteenth Amendment demands that it must do so in a fair and equitable manner.¹⁴ But this Veterans' Preference formula, tied as it is to federal military enrollment policy, is neither fair nor equitable in its impact on women. Given the fact that effective, but less drastic, alternatives are available, the state may not give an absolute and permanent preference in the area of public employment to its veterans at the expense of its women who, because of circumstances totally beyond their control, have little if any chance of becoming members of the

¹³ The Veterans' Preference provided for applicants to federal civil service positions operates on just such a principle. 5 U.S.C. §§ 2108, 3309-12, 3316. See generally U.S. Civil Service Commission, *History of Veterans' Preference in Federal Employment* (1956). Cf. *Johnson v. Robison*, 415 U.S. 361 (1974); *Mitchell v. Cohen*, 333 U.S. 411 (1948).

¹⁴ *Boston Chapter N.A.A.C.P., Inc. v. Beecher*, 504 F. 2d 1017 (1st Cir. 1974), cert. denied, 421 U.S. 910 (1975); *Castro v. Beecher*, 459 F. 2d 725 (1st Cir. 1972); *Feinerman v. Jones*, 356 F. Supp. 252, 257-58 (M.D. Pa. 1973). Cf. *Pickering v. Board of Education*, 391 U.S. 563 (1968); *Greene v. McElroy*, 360 U.S. 474 (1959); *Slochower v. Board of Higher Education*, 350 U.S. 551 (1956); *Wieman v. Updegraff*, 344 U.S. 183 (1952).

preferred class. Under these circumstances, this court holds that Mass. Gen. Laws ch. 31, § 23 deprives women of equal protection of the laws and, therefore, is unconstitutional.¹⁵

LEVIN H. CAMPBELL,
Circuit Judge.

JOSEPH L. TAURO,
District Judge.

¹⁵ In view of this holding we have no occasion to consider the plaintiff's argument that the Massachusetts Veterans' Preference violates due process by creating an irrebuttable presumption which has no basis in fact.

APPENDIX.

Mass. Gen. Laws ch. 31, § 23, the heart of the Veterans' Preference provisions of the Massachusetts Civil Service Law, provides:

The names of persons who pass examinations for appointment to any position classified under the civil service shall be placed upon the eligible lists in the following order:

(1) Disabled veterans as defined in section twenty-three A, in the order of their respective standing; (2) veterans in the order of their respective standing; (3) persons described in section twenty-three B in the order of their respective standing; (4) other applicants in the order of their respective standing. Upon receipt of a requisition, names shall be certified from such lists according to the method of certification prescribed by the civil service rules. A disabled veteran shall be retained in employment in preference to all other persons, including veterans.

Mass. Gen. Laws ch. 4, § 7, cl. 43 provides a general definition of the term veteran.

"Veteran" shall mean any person, male or female, including a nurse, (a) whose last discharge or release from his wartime service, as defined herein, was under honorable conditions and who (b) served in the army, navy, marine corps, coast guard, or air force of the United States for not less than ninety days active service, at least one day of which was for wartime service, provided, that any person who so served in wartime and was awarded

a service-connected disability or a Purple Heart, or who died in such service under conditions other than dishonorable, shall be deemed to be a veteran notwithstanding his failure to complete ninety days of active service.

"Wartime service" shall mean service performed by a "Spanish War veteran", a "World War I veteran", a "World War II veteran", a "Korean veteran", a "Vietnam veteran", or a member of the "WAAC". . . .

None of the following shall be deemed to be a "veteran":

(a) Any person who at the time of entering into the armed forces of the United States had declared his intention to become a subject or citizen of the United States and withdrew his intention under the provisions of the act of Congress approved July ninth, nineteen hundred and eighteen.

(b) Any person who was discharged from the said armed forces on his own application or solicitation by reason of his being an enemy alien.

(c) Any person who was designated as a conscientious objector upon his last discharge or release from the armed forces of the United States.

(d) Any person who has been proved guilty of wilful desertion.

(e) Any person whose only service in the armed forces of the United States consists of his service as a member of the coast guard auxiliary or as a temporary member of the coast guard reserve, or both.

(f) Any person whose last discharge or release from the armed forces is dishonorable.

"Armed forces" shall include army, navy, marine corps, air force and coast guard.

"Active service in the armed forces", as used in this clause shall not include active duty for training in the army national guard or air national guard or active duty for training as a reservist in the armed forces of the United States.

Mass. Gen. Laws ch. 31, §§ 21 and 21A then add to the general definition provided in chapter 4.

Section 21 provides:

[t]he word "veteran" as used in this chapter shall mean: any citizen who: —

(a) Is a veteran as defined in clause Forty-third of section seven of chapter four, or (b) meets all the requirements of said clause Forty-third except that instead of performing wartime service as so defined he has been awarded one of the campaign badges enumerated in this section, or has been awarded the congressional medal of honor.

"Campaign badges" shall include the following and no other: —

Indian Campaign, Mexican Service, Mexican Border Service, Army of Cuban Occupation, Army of Puerto Rican Occupation, Nicaraguan Campaign nineteen hundred and twelve, Haitian Campaign nineteen hundred and fifteen, or nineteen hundred and nineteen and nineteen hundred and twenty, Dominican Campaign, Second Nicaraguan Campaign, Yangtze Service, Army of Occupation of Germany, China Service, Navy Occupation Service, Army of Occupation, or Medal for Humane Action.

Section 21A provides:

[f]or the purpose of this chapter only, the word "veteran" shall include any person who meets all the requirements of section twenty-one except that instead of performing ninety days' active service, including ten days' wartime service as so defined, he has performed active service in the armed forces of the United States at any time between April sixth, nineteen hundred and seventeen and November eleventh, nineteen hundred and eighteen, inclusive, or any person with active service in the armed forces at any time between September sixteenth, nineteen hundred and forty and June ninth, nineteen hundred and fifty-four, inclusive, who took an examination or filed an application on or before June ninth, nineteen hundred and fifty-four or who was on an existing civil service eligible list on said date.

CAMPBELL, *Circuit Judge* (concurring). I join the opinion of the court, and wish only to reemphasize the limited reach of our holding. A state may lawfully enact legislation to benefit its veterans, and one way that it may do so is by giving them preference in the obtaining of public employment. But I see a basic distinction between giving veterans credit and even a headstart over other jobseekers on the one hand, and on the other giving them complete entitlement to the most desirable jobs, no matter what the competition. The Massachusetts veterans preference statute does the latter, and I therefore believe it goes too far, by creating a preference so absolute that all women, except the very few who are veterans, are effectively and permanently barred from all areas of civil service employment not shunned by men.

Admittedly the statute is not on its face gender-based, and I agree with Judge Murray that a state, in pursuit of its lawful objects, can go very far in enacting legislation that has an incidental impact upon persons of one gender. But surely if legislation has the effect of broadly excluding a constitutionally protected group such as women from opportunities normally open to all, there comes a point where courts must ask not only whether the state's aims are lawful but whether the means are permissible. Here I am of the opinion that the exclusionary impact is so total as to amount to a denial of equal protection under the fourteenth amendment. There are available to Massachusetts many other means for aiding and preferring its veterans which would not lead to a near blanket, permanent exclusion of all women from a major sector of employment.

LEVIN H. CAMPBELL,
Circuit Judge.

Murray, J. I concur in the opinion and judgment of the court in the *Anthony* case.

The court holds in the *Feeney* case that Mass. Gen. Laws ch. 31, § 23 is unconstitutional because it deprives women of equal protection of the laws. In reaching this result the court acknowledges that the Massachusetts Veterans' Preference statutory scheme "was not enacted for the purpose of disqualifying women from receiving civil service appointments," *ante* at 25, that the policy of "rewarding . . . those who have rendered public service as members of the military is a worthy state purpose," *id.* at 26, and that " . . . there is no constitutional right to public employment." *Id.* at 36. The court also declares that there is nothing in the Fourteenth Amendment that prohibits the state from "providing special treatment to veterans in considering candidates for public employment," *id.* at 28, and that such a state policy "responsibly recognizes both the special problems of veterans and the need to promote an important aspect of the nation's welfare." *Id.* at 29. I find nothing in the statutory scheme to support the supposition that the Commonwealth in furtherance of the legitimate state purposes referred to by the court has created a statutory classification which is either gender based or invidiously discriminates against women.

As justification for its holding, the court employs a means/end calculus to assess the constitutionality of the Veterans' Preference statute by analyzing the effect on women of its implementation. Using this analysis the court concludes that while the end of rewarding veterans is legitimate and rational, the means adopted by the statutory scheme to achieve the end are not. At the heart of the court's decision is the conclusion that there is justification in the equal protection clause for a court to exercise "its fundamental responsibility to ensure that all citizens are treated equally and fairly under the law." *Id.* at 30. This largely unobjectionable general statement of

justification can quite easily be read as authority for a court's displacement of every choice of classification made by a legislature.¹ Considerations of federalism and separation of powers, however, have disciplined the exercise of this "responsibility" by causing development by the Supreme Court of certain traditional principles for evaluation of equal protection challenges to state legislation. The central theme of the equal protection analysis developed by the Supreme Court has been the search for the proper standard of review by which to measure challenged legislation. I find in the court's opinion here with its means/end calculus neither sufficient concern for the institutional considerations militating against displacement of state legislation nor a fully articulated standard by which the legislature's choice of means should be evaluated. Having concluded that proper concern for the relevant considerations leads to a standard of review under which the legislation challenged in this case must be sustained, I respectfully dissent for the reasons stated below.

I.

In addressing an equal protection challenge to state legislation a court must be sensitive to the crucial institutional considerations which define its role as that of restraint when

¹ Professor Cox has noted, "[o]nce loosed the idea of Equality is not easily cabined." Cox, *The Supreme Court, 1965 Term — Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 Harv. L. Rev. 91 (1966). The equal protection clause has not been read, however, as a general warrant to rewrite legislation because some persons are treated differently from others in the classification schemes established by legislation. "Classification is inherent in legislation; the Equal Protection Clause has not forbidden it." *Morey v. Doud*, 354 U.S. 457, 472 (1957). (Frankfurter, J., dissenting).

called upon to interpose its judgment against the judgment of the political processes of the states. Justice Brennan has noted that "[t]he maintenance of the principles of federalism is a foremost consideration in interpreting any of the pertinent constitutional provisions under which [the Supreme] Court examines state action." *Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 532 (1959) (Brennan, J., concurring). Principles of federalism are not merely a recognition "that our Constitution is an instrument of federalism," *id.*, but also a recognition of the value of state experimentation with a variety of means for solving social and economic problems. Cf. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). See *Younger v. Harris*, 401 U.S. 37 (1971) (Black, J., for the Court, for a discussion of "Our Federalism"). In approaching the legislation challenged here these principles require due recognition of the settled arrangements adopted by virtually every state legislature² — not to mention the Federal Government³ — granting some form of veterans preference in public employment.

The doctrine of separation of powers requires that the courts give deference to the means by which the representative branches of government choose to implement state policies. Justice Harlan has succinctly summarized the dangers inherent in overly intrusive judicial review of legislation:

It is said that there can be nothing wrong with courts exercising [active judicial review] because whatever they may do can always be undone by legislative enactment

² All but four states use a veterans preference in connection with public employment appointments. Brief for the Defendants at 34 n. 9 Cf. *Koelfgen v. Jackson*, 355 F. Supp. 243, 252 n. 9 (D. Minn. 1972), *aff'd mem.* 410 U.S. 976 (1973).

³ 5 U.S.C. §§ 2108, 3309-12, 3316.

or constitutional amendment . . . [But] in the end what would eventuate would be a substantial transfer of legislative power to the courts.

Harlan, *Thoughts at a Dedication: Keeping the Judicial Function in Balance*, 49 A.B.A.J. 943, 944 (1963).

The issue for the courts examining challenged legislation as Justice Douglas, speaking for the Court, put it in a case upholding a state statute which discriminated against men on the basis of gender as such,

is not whether the statute could have been drafted more wisely, but whether the lines chosen by the . . . Legislature are within constitutional limitations. The dissents would use the Equal Protection Clause as a vehicle for reinstating notions of substantive due process that have been repudiated. "We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, [which] are elected to pass laws."

Kahn v. Shevin, 416 U.S. 351, 356 n. 10 (1974).

In weighing the separation of powers considerations inherent in any constitutional challenge to legislation "it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." *Missouri, K. & T. Ry. v. May*, 194 U.S. 267, 270 (1904) (Holmes, J.). It is therefore not inapposite to note in considering the challenge here that Congress has taken an active role in defining the applicability of the Fourteenth Amendment to gender discrimination in the employment context through Title VII of the Civil Rights Act of 1964.

42 U.S.C. § 2000e-2. Congress, however, has specifically chosen to protect veterans preference legislation from challenge under Title VII. 42 U.S.C. § 2000e-11.⁴ To paraphrase Justice Brennan in *Frontiero v. Richardson*, 411 U.S. 677 (1973), the judgment of a coequal branch of government which has specifically addressed the issue of accommodating equal employment rights with veterans preference legislation is not without significance in evaluating the question presented in this case. *Id.* at 687-88.

II.

Guidance for judicial inquiry in an equal protection case is set out in *Dunn v. Blumstein*, 405 U.S. 330 (1972), where the Court said "we look, in essence, to three things: the character of the classification in question; the individual interests affected by the classification; and the governmental interests asserted in support of the classification." *Id.* at 335. The gravamen of plaintiff Feeney's complaint is that the statute and its implementation "unlawfully discriminate in public employment on the basis of sex." Para. 36. The Supreme Court, in recent cases, has defined sex discrimination as dissimilar treatment of men and women who are similarly situated. *Frontiero v. Richardson*, *supra*, at 688, citing *Reed v. Reed*, 404 U.S. 71, 77 (1974).

Treating the statutory classification first, it is obvious that the division between veterans and non-veterans is not drawn along sex lines and does not provide for dissimilar treatment for similarly situated men and women. On its face the statute is neutral, and, beyond that, there is no showing that the

⁴ Cf. EEOC, Decision 74-64, CCH Emp. Prac. Guide ¶ 6419.

statutory class distinctions "are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other. . .". *Geduldig v. Aiello*, 417 U.S. 484, 496-97 n. 20 (1974). The statute was not passed to disqualify women from civil service appointments, as the court has acknowledged. *Ante* at 25. If there exists the almost insuperable barrier to women attaining higher level civil service jobs, a result the court has found, it is a circumstance that non-veteran women share with a large number of non-veteran men.⁵ This circumstance presents an even less compelling claim for sex discrimination than *Geduldig v. Aiello*, *supra*, where only women were in the group burdened by the classification.⁶ I cannot assent to the supposition that plaintiff has shown the classification challenged here to be sex based or that

⁵ The agreed statement of facts filed by the parties indicates that 852,000 male veterans and 16,000 female veterans reside in the Commonwealth. The agreed statement also indicates that approximately 1,990,000 males and 1,990,000 females over the age of 18 live in the Commonwealth. Anthony Statement ¶ 35. Based upon these figures, approximately 57 percent of the males over the age of 18 and 99 percent of the females over 18 in the Commonwealth are non-veterans.

⁶ The court distinguishes *Geduldig* on the basis of the subject matter of the legislation challenged there — California's disability insurance program. *Ante* at 25 n. 8. But the principle teaching of *Geduldig* as I view it is the definition of sex discrimination. The Supreme Court's definition stated therein, as legislation that is either based on gender as such or invidiously discriminates against one or the other sex, has led one commentator who favors a much broader constitutional definition of sex discrimination to conclude that:

the Court will not find states to be engaging in invidious discrimination in violation of the equal protection clause where they draw distinctions between men and women on the basis of traits exclusive and peculiar to one or the other sex.

Comment, *Geduldig v. Aiello, Pregnancy Classifications and the Definition of Sex Discrimination*, 75 Colum. L. Rev. 441, 442 (1975).

it invidiously discriminates against women.⁷ Having reached that conclusion, I, like the court, find it unnecessary to address the question whether sex discrimination involves legislative creation of a suspect category.⁸

It is clear that plaintiff Feeney's interest at stake in the case is her interest in appointment to an administrative assistant position in the civil service. There is, to be sure, a due process dimension to the procedures by which the Commonwealth provides for the allocation of civil service jobs.⁹ More

⁷ The court states that "in the context of the Fourteenth Amendment '[t]he result, not the specific intent is what matters,'" *ante* at 29, citing six cases in support of that proposition. I find nothing in the cases cited, particularly in light of the teaching of *Geduldig* regarding the definition of sex discrimination, to justify an "impact" theory of discrimination here. Cf. *Smith v. Troyan*, 520 F. 2d 492 (6th Cir. 1975), *petition for cert. filed*, 44 U.S.L.W. 3360.

⁸ A majority of the Supreme Court has not yet been found to declare sex discrimination a suspect classification. Cf. *Frontiero v. Richardson*, 411 U.S. 677, 682-88 (1973) (Brennan, J., for plurality contending sex is suspect classification). A majority of the Court has apparently not found it necessary to reach the question. Cf. *Stanton v. Stanton*, 421 U.S. 7, 13 (1975); *Smith v. Troyan*, 520 F. 2d at 495 n. 6.

⁹ See, e.g., *Arnett v. Kennedy*, 416 U.S. 134 (1974); *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Perry v. Sinderman*, 408 U.S. 593 (1972).

The court takes the position that the Fourteenth Amendment "demands that [a state providing public employment] must do so in a fair and equitable manner." *Ante* at 36 & n. 14. I do not read *Boston Chapter N.A.A.C.P., Inc. v. Beecher*, 504 F. 2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975), and *Castro v. Beecher*, 459 F. 2d 725 (1st Cir. 1972), to mandate in a public employment context a more rigorous constitutional concept than is required by traditional equal protection analysis or by Title VII when applicable. As the court pointed out in *Feinerman v. Jones*, 356 F. Supp. 252:

All of the cases which have talked of the need for compelling state interests in connection with state employment practices have either involved other constitutional rights, such as first amendment freedoms,

to the point for purposes of analysis of equal protection grounds, the basis on which the court rests its decision, is whether plaintiff's interest in public employment can be termed a "fundamental interest," a term having specific consequences for determination of the proper standard of federal review of the legislation. The Supreme Court in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), articulated the "key to discovering" whether an asserted individual interest can be viewed to be of such fundamental importance that unequal treatment of the interest under a state statute, absent a strong showing of justification, will require a federal court to strike down the legislation. The Court there stated that "the answer lies in assessing whether [the interest is] explicitly or implicitly guaranteed by the Constitution." *Id.* at 33-34, see *Shapiro v. Thompson*, 394 U.S. 618, 642 (1969) (Stewart, J., concurring). As the court here acknowledges, *ante* at 36, there is no constitutional right to public employment, and, therefore, under traditional equal protection analysis the plaintiff's interest cannot be viewed to be a "fundamental interest."

or have dealt with the exclusion or dismissal of people from public employment on arbitrary grounds without proper due process procedures.

Id. at 258.

Plaintiff's due process argument that the statute is unconstitutional because it raises an irrebuttable presumption that non-veterans are not as qualified for civil service positions as are veterans is not persuasive. The doctrine of irrebuttable presumptions is directed at statutory schemes which raise evidentiary presumptions against a specific class. See, e.g., *Board of Educ. v. LaFleur*, 414 U.S. 632 (1974); *Vlandis v. Kline*, 412 U.S. 441 (1973). The due process objection to those presumptions is that they cannot be overcome by factual demonstration. The classification effected by the Veterans' Preference statute under attack here is of a different character. It does not represent an evidentiary assumption, rather it represents a policy choice of rewarding one class of citizens.

There are valid reasons which justify the Commonwealth's interest in creating a preference for veterans, that is, of providing special benefits to a class of persons deemed to have made special sacrifices for their country. In *Feinerman v. Jones*, 356 F. Supp. 252 (M.D. Pa. 1973) (three-judge court), the "underlying justifications" of upholding Veterans' Preference legislation were expressed:

- (1) As a recognition that the experience, discipline, and loyalty which veterans gain in military service is conducive to the better performance of public duties;
- (2) As a reward for those veterans who, either involuntarily or through enlistment, have served their country in time of war; and
- (3) As an aid in the rehabilitation and relocation of the veteran whose normal life style has been disrupted by military service. [Footnote omitted.]

Id. at 259. Other courts have held these reasons a valid basis for the statutory classification of veterans and non-veterans. See *Russell v. Hodges*, 470 F. 2d 212, 218 (2d Cir. 1972); *Koelfgen v. Jackson*, 355 F. Supp. 243 (D.C. Minn. 1972) (three-judge court), *aff'd mem.* 410 U.S. 976 (1973). Cf. *Hutcheson v. Director of Civil Service*, 361 Mass. 480 (1972).¹⁰ There is nothing in the Fourteenth Amendment that precludes the granting of a preference to veterans who have initially passed a civil service examination.

¹⁰ *Johnson v. Robison*, 415 U.S. 361 (1974); *Mitchell v. Cohen*, 333 U.S. 411 (1948).

III.

Traditional equal protection analysis has presented a court with a choice of tests to determine the validity of challenged state legislation — restrained review and active review. See generally, *Developments in the Law — Equal Protection*, 82 Harv. L. Rev. 1065, 1076-1132. As the Supreme Court stated in *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 172 (1972): "The tests to determine the validity of state statutes under the Equal Protection Clause have been variously expressed, but this Court requires, at a minimum, that a statutory classification bear some rational relationship to a legitimate state purpose." Active review — a strict standard of review under the Equal Protection Clause — which requires the state to show that the statutory classification was necessary to promote a "compelling state interest," is called for only when the discrimination is based on a classification of a suspect character or adversely affects a fundamental interest. The factual requirements calling for active review are not present and a more restrained standard of review should be applied here.¹¹

Assuming *arguendo* that the statutory scheme challenged here is sex discrimination, plaintiff's claim should be tested by a standard of review which lies somewhere between restrained review and active review.¹² In *Reed v. Reed*, *supra*, where the classification in the statute was explicitly sex based, the standard articulated was that the challenged classification "must be reasonable, not arbitrary, and must rest upon some

¹¹ See Section II of this opinion *supra*.

¹² As more fully discussed in Section II, *supra*, I have concluded that this case does not involve sex discrimination. Accordingly, the standard of review I would employ here would be one even less demanding than that discussed in the text in Sections III and IV.

ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike." 404 U.S. at 76, citing *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). This traditionally deferential articulation of the standard has been applied in gender-based classification cases with a good deal more vigor than would normally be associated with restrained review. An intermediate standard has been articulated and applied in cases involving gender-based discrimination as embodying a requirement that the state show "a factually demonstrable distinction between the positions of the men and women affected by the classification which is substantially related to its objective." *Women's Liberation Union of Rhode Island v. Israel*, 512 F. 2d 106, 108 (1st Cir. 1975). See also, Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee — Prohibited, Neutral, and Permissive Classifications*, 62 Geo. L. J. 1071 (1974). Even assuming this case involves sex discrimination, based on the court's finding on the record here of nonintentional adverse discriminatory impact on women as a class, a less stringent standard of review than the demonstrable rational basis test is justified. Cf. *Castro v. Beecher*, 459 F. 2d 725, 733 (1st Cir. 1972).

IV.

In applying the demonstrable rational basis test to the case here, it should be recognized that the Veterans' Preference statute and the civil service regulations represent a fully considered "rough accommodation"¹³ of the Commonwealth's

¹³ The Veterans' Preference and the civil service scheme have been modified from time to time throughout their history and the Commonwealth has

interests which come into play when priorities are set for the allocation of a limited state resource. Cf. *San Antonio Independent School District v. Rodriguez*, 411 U.S. at 55. The scheme provides for identification through a test of the pool of applicants qualified to perform a specific job; it then arranges the qualified persons on an eligibility list in the order of their performance on the test. The statute provides that the names of persons who pass the examinations for appointment to a civil service position shall be divided into two classes: veterans and non-veterans. Those men and women placed in the veterans classification receive the benefit of the statute and those men and women not classed as veterans do not receive the benefit of the statute. The preference is integrated into the scheme by placing qualified veterans at the top of the eligibility list. The statutory scheme incorporates in two ways a policy of the Commonwealth that raw test score need not be the absolute measure of whether an individual should be chosen for a job. First, it provides certification to an appointing authority in order of appearance on the list of a number of persons greater than the number of jobs available, but leaves the appointing authority free to select a certified applicant irrespective of the applicant's test score; second, the scheme gives special advantage in placement on the list to qualified veterans.

not been adverse to limiting the breadth of the preference. Brief for the defendants at 44-45. The Commonwealth's efforts to adjust the competing interests involved in civil service selection procedures are well illustrated by the disposition of the *Anthony* case. This change in the application of the Veterans' Preference is but a recent illustration of the Commonwealth's continuing efforts to accommodate the claims of diverse groups for the limited number of state jobs.

Where the clear purpose of the statute is to prefer qualified veterans for consideration for civil service jobs, analysis of the statutory scheme and the civil service regulations demonstrates that the classification at the very least substantially serves and furthers obvious state interests. To assert that the legislation "suspends the application of . . . job-related criteria and substitutes a formula that relegates demonstrable professional qualifications to a secondary position, absolutely and permanently," *ante* at 31, or that the Commonwealth has "incorporated into its public employment policy a set of criteria having no demonstrable relation to an individual's fitness for civilian public service," *ante* at 34, assumes the unacceptable premise that only selection criteria adhering exclusively and strictly to raw test score meet the standard of "demonstrable professional qualifications." Irrespective of whether the preference for veterans is applied in the selection of an applicant for a civil service job, the Commonwealth, as noted above, does deviate from the raw test scores in its selection procedures. The assertion that the preference is absolute and permanent is but another way of declaring that "the preference accorded to veterans is simply too great," *Rios v. Dillman*, 499 F. 2d 329, 332 (5th Cir. 1974), not that there is no rational basis for the classification.

The Commonwealth's Veterans' Preference statute is based on the factually demonstrable distinction of whether or not a person is a veteran. This classification is substantially related to the Commonwealth's purpose to benefit veterans in the area of public employment. The Commonwealth's choice of means to implement the purpose does not invidiously discriminate against women. The issue is whether the means chosen by the Commonwealth are within constitutional limitations, and as I believe they are I am unwilling to engage in speculation

regarding alternative measures¹⁴ for achieving the statutory purpose. I would uphold the statute.

FRANK J. MURRAY,
United States District Judge.

¹⁴ A bonus point Veterans' Preference such as the one employed by the Federal Government, *ante* at 36-37 & n. 13, is one which would appear to have no practical effect of benefiting non-veteran women, like the plaintiff, seeking administrative assistant positions. After reordering the administrative assistant list, *see* Brief of the Plaintiffs at 235-38, to apply a bonus point preference system like the Federal system, it appears that the highest non-veteran woman would not be reached until at least eighteen names are certified from the list. Plaintiff would not be reached under such system until at least 31 names are certified. Since under civil service procedure the number of requisitioned positions would result in certification of no more than eleven names, no benefit would accrue under such bonus point system to non-veteran women generally and plaintiff in particular.

United States District Court. District of Massachusetts.

HELEN B. FEENEY,
PLAINTIFF,

v.

CIVIL ACTION
No. 75-1991-T

THE COMMONWEALTH OF
MASSACHUSETTS ET AL.,
DEFENDANTS.

Notice of Appeal to the Supreme Court of the United States.

Notice is hereby given that the Defendants, acting by and through their attorneys and pursuant to Supreme Court Rule 10, hereby appeal the judgment of this Court to the Supreme Court of the United States. In accordance with the provisions of Supreme Court Rule 10(2), the Defendants specify:

1. The parties taking the appeal are the Personnel Administrator of the Commonwealth (referred to as the Massachusetts Director of Civil Service in the pleadings) and the members of the Massachusetts Civil Service Commission, who are collectively referred to herein as the Defendants;

2. Defendants appeal from paragraph 3 of the Judgment and Order of the Court entered by Tauro, D.J., on March 29, 1976, and from the order enjoining Defendants from utilizing Mass. Gen. Laws c. 31, § 23 in any future selection of persons to fill civil service positions with the Commonwealth; and

3. Direct appeal to the Supreme Court of the United States is authorized by 28 U.S.C. 1253.

Respectfully submitted,

By Their Attorneys,

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Dated: May 25, 1976.

SUPREME COURT OF THE UNITED STATES

COMMONWEALTH OF MASSACHUSETTS ET AL. v.
HELEN B. FEENEY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS

No. 76-265. Decided November 8, 1976

PER CURIAM.

This Court, on its own motion, hereby certifies to the Supreme Judicial Court of the Commonwealth of Massachusetts, pursuant to Rule 3:21 of the Rules of that court, the question of law hereinafter set forth.

Statement of Facts

On March 29, 1976, a three-judge Federal District Court in the District of Massachusetts, after dismissing the Commonwealth of Massachusetts and its Division of Civil Service as parties defendant, entered a judgment for Helen B. Feeney against the Massachusetts Director of Civil Service (now designated "Personnel Administrator of the Commonwealth") and members of the Massachusetts Civil Service Commission, declaring unconstitutional the Massachusetts Veterans' Preference, Mass. Gen. Laws c. 31, § 23, and enjoining its enforcement by said state officers. *Feeney v. Commonwealth of Massachusetts, et al.*, — F. Supp. — (Mass. 1976).

The Attorney General for the Commonwealth, who appeared for all parties defendant in the District Court, has filed a Jurisdictional Statement in this Court stating, at 1-2, that the same is filed "on behalf of the Personnel Administrator of the Commonwealth and the Massachusetts Civil Service Commission," the state officers against whom the District Court judgment was entered. However, the Personnel Administrator of the Commonwealth and the members of the Civil Service Commission have advised the Clerk of this Court, by letter of September 1, 1976, that "the appeal

is without our authorization," that "each of us informed the Attorney General of our request that this matter not be appealed," and that "we request that the Court dismiss the appeal." A stipulation filed in the District Court dated June 21, 1976, signed by the Attorney General and the attorney for appellee, confirms these statements in the letter, and states further that the Governor of the Commonwealth has also requested the Attorney General not to prosecute an appeal.

The Attorney General, on October 8, 1976, filed a brief in this Court supporting his authority under state law to docket the appeal.

It therefore appears that there are involved in the proceeding before this Court questions of Massachusetts law which may be determinative of such cause, with respect to which there seem to be no clearly controlling precedents in the decisions of the Massachusetts Supreme Judicial Court. Accordingly, this Court desires to certify to the Supreme Judicial Court of Massachusetts, pursuant to Rule 3:21 of its Rules, the following question:

Question Certified

Under the circumstances herein presented, does Massachusetts law authorize the Attorney General of the Commonwealth to prosecute an appeal to this Court from the judgment of the District Court without the consent and over the expressed objections of the state officers against whom the judgment of the District Court was entered?

MR. JUSTICE BLACKMUN would dismiss the appeal for want of jurisdiction.

Supreme Court of the United States.

COMMONWEALTH OF MASSACHUSETTS ET AL.

v.

HELEN B. FEENEY.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS.

October 11, 1977.

No. 76-265. MASSACHUSETTS ET AL. v. FEENEY. Appeal from D.C. Mass. Motion of John R. Buckley, Secretary of Administration and Finance of Massachusetts, for leave to file a brief as *amicus curiae* granted. Judgment vacated and case remanded for further consideration in light of *Washington v. Davis*, 426 U.S. 229 (1976). MR. JUSTICE BRENNAN, MR. JUSTICE MARSHALL, and MR. JUSTICE POWELL would note probable jurisdiction and set case for oral argument. Reported below: 415 F. Supp. 485.

**United States District Court
for the District of Massachusetts.**

No. 75-1991-T.

[Title omitted in printing.]

**Plaintiff's Motion for Leave to Amend
and Supplement the Complaint.**

Pursuant to Rules 15(a) and (d) of the Federal Rules of Civil Procedure, the plaintiff Helen B. Feeney moves for leave to amend and supplement the Complaint herein by adding the following Count which is asserted under principles of pendent jurisdiction:

COUNT IV

46. The plaintiff reasserts the averments of Paragraphs 1 through 35, inclusive, of this Complaint with the same force and effect as if herein set forth and repeated in full.

47. The Veterans' Preference Statute and the rules and regulations of the Division implementing said Statute and their enforcement by the defendants have deprived and continue to deprive the plaintiff of the equal protection of the laws and of due process of law in violation of Article I of Part the First of the Massachusetts Constitution, as most recently amended in November, 1976 by adoption of the Equal Rights Amendment.

48. Plaintiff has no plain and adequate remedy at law for said continuing violation of her rights under Article I of Part the First of the Massachusetts Constitution.

A memorandum in support of this motion is filed herewith.

By her attorneys,

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November 28, 1977

**United States District Court
for the District of Massachusetts.**

No. 75-1991-T.

[Title omitted in printing.]

**Defendants' Opposition to Plaintiff's Motion for Leave
to Amend and Supplement the Complaint.**

Defendants hereby oppose Plaintiff's Motion for Leave to Amend and Supplement the Complaint which seeks, under principles of pendent jurisdiction, to add a count alleging a violation of the recently-enacted "Equal Rights Amendment" to the Massachusetts Constitution. Mass. Const. Pt. I, Art. I. The Defendants oppose the Motion because it is not in the true interests of justice and is inconsistent with the underlying purpose of Fed. R. Civ. P. 15. The reasons for Defendants' opposition, which are stated with additional particularity in the accompanying memorandum, also include:

1. The filing of the motion was unduly delayed;
2. The proposed amendment does not state a cognizable claim since the Equal Rights Amendment became effective after the operation of the challenged statute was suspended; and
3. Allowance of the motion would result in undue prejudice to the Defendants and to those individuals whose employment preference has been diminished pending the outcome of this case. Allowance of the motion could trigger the abstention doctrine, result in the certification of questions to the Supreme Judicial Court, impede review by the United States Supreme Court on appeal and otherwise delay final adjudication on the merits of Plaintiff's claim.

For all these reasons and those contained in the accompanying memorandum, Plaintiff's motion should be denied.

By their attorney,

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DATED: November 30, 1977

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

HELEN B. FEENEY

v.

CIVIL ACTION
No. 75-1991-T

THE COMMONWEALTH OF
MASSACHUSETTS, ET AL.

Judgment and Order.

May 3, 1978.

TAURO, D.J.

1. Judgment is entered in favor of the Commonwealth of Massachusetts and the Division of Civil Service in *Feeney v. Commonwealth*, CA 75-1991-T, because these defendants are not "persons" within the meaning of 42 U.S.C. § 1983. *Anthony v. Commonwealth*, 415 F. Supp. 485, 487, n. 2 (D. Mass. 1976).

2. Judgment is entered in favor of the plaintiff Feeney in No. 75-1991-T, against the Massachusetts Director of Civil Service and the members of the Massachusetts Civil Service Commission on the ground that Mass. Gen. Laws ch. 31, § 23 (1971) (The Massachusetts Veterans' Preference Act) is unconstitutional in that it operates to deny female civil service applicants equal protection of the laws.

It is ORDERED that:

(a) The Massachusetts Director of Civil Service and the members of the Massachusetts Civil Service Commission are

hereby permanently enjoined from utilizing Mass. Gen. Laws ch. 31, § 23 (1971) in any future selection of persons to fill civil service positions with the Commonwealth.

(b) This injunction shall have no effect upon the continued status of any individual in a permanent civil service position who holds that position on the date of this injunction.

LEVIN H. CAMPBELL,
Circuit Judge.
JOSEPH L. TAURO,
District Judge.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

HELEN B. FEENEY,
PLAINTIFF,

v.

CA 75-1991-T

COMMONWEALTH OF
MASSACHUSETTS, ET AL.
DEFENDANTS

Opinion.

May 3, 1978.

TAURO, D.J.

By order of remand from the Supreme Court, we have been instructed to reconsider our decision in *Anthony v. Common-*

wealth,¹ 415 F. Supp. 485 (D. Mass. 1976), in light of the Court's subsequent decision in *Washington v. Davis*, 426 U.S. 229 (1976).² After further briefing and oral argument, we conclude that *Davis* does not require us to alter our original holding. To the contrary, we have determined that both *Davis* and the Court's later opinion in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), support our conclusion that the challenged Massachusetts Veterans' Preference statute³ deprives women

¹ This case, originally entitled *Anthony v. Commonwealth*, was brought as two separate actions under 42 U.S.C. § 1983 by four Massachusetts women challenging the Veterans' Preference statute, Mass. Gen. Laws ch. 31, § 23. The plaintiffs in *Anthony* were three non-veteran women, admitted to the Massachusetts bar, who had applied for positions as counsel to state agencies. Plaintiff Feeney, in a separate suit, sought an administrative post in the civil service. The two suits were consolidated. We determined that the claims brought by the plaintiffs in *Anthony* were rendered moot by passage in April, 1975 of Mass. Gen. Laws ch. 31, § 5, which removed all appointments for state and municipal legal positions from the provisions of the state civil service law. We considered plaintiff Feeney's claim on the merits. Our decision in the *Feeney* case is the subject of the court's remand order presently before us.

² Also before the court is plaintiff's motion to amend the complaint to add a cause of action challenging the Veterans' Preference Act as violative of the Equal Rights Amendment to the state constitution, ratified in November, 1976, several months after our original opinion had issued. Plaintiff's motion raises several important issues, namely whether an amendment to the complaint would be within the scope of the Court's order of remand, whether the doctrine of abstention would require us to certify plaintiff's claim to the Massachusetts Supreme Judicial Court, and whether we would be obliged to consider the state claim prior to reaching the federal constitutional issue in this case.

Plaintiff asserts as a basis for the motion that, in the event her federal claims are rejected, she may be estopped from bringing a separate suit based on the state claim. At oral argument, however, the Commonwealth stipulated that it would not seek to raise the defense of estoppel with respect to plaintiff's state claim should there be a subsequent proceeding in the state court. Having in mind the Commonwealth's stipulation, we deny plaintiff's motion to amend. Fed. R. Civ. P. 15(a).

³ Mass. Gen. Laws ch. 31, § 23.

of equal protection of the laws and, therefore, is unconstitutional.⁴

I

THE ANTHONY DECISION.

The broad issues in this case are treated extensively in our prior opinion. 415 F. Supp. 485. In order to put in context our reconsideration of *Anthony*, however, it is useful to outline briefly some of its major points.

The statutory scheme challenged in *Anthony* established a formula that permanently prevents a non-veteran from achieving a place on the civil service appointment list ahead of a veteran, regardless of comparative test scores.⁵ We pointed

⁴ In *Anthony*, we enjoined enforcement of Massachusetts Veterans' preference statute, Mass. Gen. Laws ch. 31, § 23, because it deprived women of equal protection under the law. The state subsequently filed a motion for relief from judgment, urging reconsideration in light of *Davis*. That motion, along with a motion for relief from judgment pursuant to Fed. R. Civ. P. 60(b)(6), was denied, although a stay pending appeal was granted. The stay was rendered moot by the passage of an interim statute, Stat. 1976, c. 200, which suspends operation of the challenged statute pending the outcome of this case on appeal. The interim statute is presently in effect and provides a modified point preference for veterans.

⁵ An applicant who passes the civil service written examination becomes an eligible and is placed on an "eligible list" under the following ranking formula:

1. Disabled veterans in order of their composite scores.
2. Other veterans in order of their composite scores.
3. Widows and widowed mothers of veterans in order of their composite scores.
4. All other eligibles in order of their composite scores.

Mass. Gen. Laws ch. 31, § 23; *Anthony v. Commonwealth*, 415 F. Supp. 485, 488 (D. Mass. 1976).

The full statutory procedure by which eligible applicants are certified and selected is set forth in our original opinion. 415 F. Supp. at 488-490.

out that "(a)s a practical matter . . . the Veterans' Preference replaces testing as the criterion for determining which eligibles will be placed at the top of the list." 415 F. Supp. at 489.

The selection formula, geared as it is to veteran status, is necessarily controlled by federal military proscriptions limiting the eligibility of women for participation in the military. Long-standing federal policy limited to 2% the number of women who could participate in the armed forces. *Anthony v. Commonwealth*, *supra*, at 489. Traditionally, enlistment and appointment criteria have been more restrictive for women than for men.⁶ An inevitable consequence of this federal policy limiting women's participation in the military is that only 2% of Massachusetts veterans are women. *Id.*

(T)he practical consequence of the operation of these federal military proscriptions, in combination with the Veterans' Preference formula is inescapable. Few women will ever become veterans so as to qualify for the preference; and so, few, if any, women will ever achieve a top position on a civil service eligibility list, for other than positions traditionally held by women.

Id. at 490.

We recognized that the prime legislative motive of the challenged statute, that of rewarding public service in the military was worthy. *Id.* at 496. But we also observed that,

⁶A complete summary of the limitations placed on women seeking entry into the armed forces is set forth in our earlier opinion. 415 F. Supp. at 489-90.

(i)t is not enough that the prime objective of the Veterans' Preference statute . . . is legitimate and rational. The means chosen by the state to achieve this objective must also be legitimate and rational.

Id. at 497.

We determined that the means chosen by the Massachusetts Legislature to reward veterans were not grounded "on a convincing factual rationale." *Id.* at 495. We pointed out that the challenged statutory formula was not an effort by the state to set priorities for finite resources; that there were less drastic alternatives available to the state, such as a point system; and that any argument attempting to relate the challenged formula to job performance or qualification was "specious." *Id.* at 495-499. We concluded that the formula relegated job-related criteria and professional qualifications to a secondary position. *Id.* at 497.

Moreover, we emphasized that the challenged preference was absolute and permanent. No time limit was imposed or attempt made "to tailor its use to those who have shortly returned to civilian life." *Id.* at 499. Such a broad-brush approach may be administratively convenient, but mere administrative convenience is not a legitimate basis for benefiting one identifiable class at the expense of another. *Reed v. Reed*, 404 U.S. 71 (1971).

Although the Veterans' Preference statute was not designed for the sole purpose of subordinating women, *Anthony v. Commonwealth*, *supra*, at 495, its clear intent was to benefit veterans even at the expense of women. As we stated,

(T)he formula's impact, triggered by decades of restrictive federal enlistment regulations, makes the operation of the Veterans' Preference in Massachusetts anything but

an impartial, neutral policy of selection, with merely an incidental effect on the opportunities for women.

Id. at 495. Rather, we found the preference formula to be

a deliberate, conscious attempt on the part of the state to aid one clearly identifiable group of its citizens, those who qualify as veterans, . . . at the absolute and permanent disadvantage of another clearly identifiable group, Massachusetts women.

Id. at 496.

The consequences of adopting a permanent absolute preference formula tied to federal enlistment restrictions were more than predictable, they were inevitable.

II

THE IMPACT OF DAVIS ON ANTHONY.

At issue in *Davis* was a pre-employment literacy test used by the District of Columbia police department. The district court rejected plaintiffs' allegation that the test was "culturally slanted" to favor whites. It determined further that the test was "reasonably and directly" related to the requirements of the police recruit training program, although unrelated to actual job performance. 426 U.S. at 235. The D.C. Circuit reversed, holding irrelevant the failure of plaintiffs to allege and prove discriminatory intent in the exam's design and administration. It determined that the disproportionate percentage of blacks who had failed the exam sufficed to establish a constitutional violation. *Id.* at 236-37.

In reversing the court of appeals, the Supreme Court stated that claims of invidious discrimination under the fifth or fourteenth amendments require proof of a discriminatory purpose. A facially neutral statute may not be deemed vulnerable to equal protection challenge solely because it has a disproportionate impact. That Court emphasized that discriminatory intent need not be "express or appear on the face of the statute." 426 U.S. at 241, but that consideration must be given to the totality of the circumstances. Disproportionate impact is one such highly relevant circumstance we must consider.

Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another. It is also not infrequently true that the discriminatory impact . . . may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds. Nevertheless, we have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution.

426 U.S. at 242. See also *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977). This point was amplified by Justice Stevens in his concurring opinion.

Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds. This is particularly true in the case of governmental action which is frequently the product of compromise, of collective decisionmaking, and of mixed motivation.

Id. at 252 (Stevens, J., concurring). See also *Dayton Board of Education v. Brinkman*, 97 S. Ct. 2766 (1977) (Stevens, J., concurring).

A major factor distinguishing *Davis* from the case at hand is the nature of the selection procedure challenged in each case. Although the plaintiffs in *Davis* originally challenged the entire District of Columbia police recruitment scheme, the sole issue before the Supreme Court was the validity of the written civil service test. *Washington v. Davis*, *supra*, at 233-35.

The district court in *Davis* determined that the challenged test was neutral on its face. *Id.* at 235. This determination apparently provided a basis for the Court's statement that,

A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white

Id. at 248. (Footnotes omitted.)

The factual underpinning in this case is entirely different. As we have already emphasized, the Veterans' Preference statute is "anything but an impartial, neutral policy of selection with merely an incidental effect on the opportunities for women." 415 F. Supp. at 495. Here, plaintiff does not challenge the civil service written examination but, rather, the overriding ranking formula that mandates an absolute job preference to veterans over non-veterans, regardless of comparative test scores. This preference formula effectively "replaces testing as the criterion for determining which eligibles will be placed at the top of the list." *Id.* at 489.

In analyzing the "totality of the relevant facts" so as to determine the legislative intent underlying the challenged statute, we must of necessity examine official acts or policies to determine whether they had the natural, foreseeable and inevitable effect of producing a discriminatory impact.⁷ See

⁷ Defendants assert that a "foreseeability test" violates the mandate in *Davis*. Specifically, defendants rely on the Court's remand in *Austin Independent School District v. United States*, 429 U.S. 990 (1977), for the proposition that "inferences about intent flowing from arguably foreseeable consequences is not a substitute" for inquiry into specific intent. Defendants' Reply Brief at 7.

An order of remand is ambiguous in import. Justice Powell's concurrence suggests the remand in *Austin* may have been prompted by the breadth of the remedial relief ordered. 429 U.S. at 991, 992. See also *School District of Omaha v. United States*, 97 S. Ct. 2905 (1977); *Dayton Board of Education v. Brinkman*, 97 S. Ct. 2766 (1977). We will not presume that the Court utilized a remand order in *Austin* to abrogate the basic precept that a person is deemed to intend the natural, probable and foreseeable consequences of his actions. Nothing in *Davis* would indicate rejection in equal protection cases of this long-standing principle. See *Arthur v. Nyquist*, 429 F. Supp. 206, 210 (W.D. N.Y. 1977). Indeed, the Court recognized the difficulty of direct proof of intent, stating that the discriminatory purpose need not be express or appear on the face of the statute. 426 U.S. at 241. Moreover, Justice Stevens' concurrence suggests that this precept has continued vitality. *Id.* at 253 (Stevens, J., concurring).

Washington v. Davis, supra, at 253 (Stevens, J., concurring); *N.A.A.C.P. v. Lansing Board of Education*, 559 F.2d 1042 (6th Cir. 1977).

The legislature was, at the least, chargeable with knowledge of the long-standing federal regulations limiting opportunities for women in the military,⁸ and the inevitable discriminatory consequences produced by their application to the challenged formula.⁹

Defendants cite two cases where the "foreseeability test" was considered and rejected. *United States v. City of Chicago*, 549 F.2d 415 (7th Cir. 1977); *Guardians Ass'n of the New York City Police Dep't v. Civil Service Comm'n*, 431 F. Supp. 526 (S.D. N.Y. 1977). These cases are clearly distinguishable. In both, the challenged procedures were found to be neutral. Here, we have determined the challenged statutory scheme to be "anything but an impartial, neutral policy of selection." 415 F. Supp. at 495.

We do not hold that in all cases a plaintiff may attempt to circumvent the intent requirement of *Davis* solely by presenting proof of foreseeability of impact. We are dealing here with a statute that is not facially neutral. Moreover, it has an inevitable discriminatory impact on a clearly identifiable class. These are relevant facts to consider in determining underlying legislative intent.

⁸See *Anthony v. Commonwealth*, 415 F. Supp. 485, 489-90 (D. Mass. 1976).

⁹The legislative history does suggest an awareness on the part of the lawmakers of the predictable discriminatory impact the preference formula would have on women. Until 1971, most of the veterans' preference statutes and civil service regulations included provisions approving the practice of requisitioning only female applicants for certain positions. Jobs for which women were requisitioned were exempted from operation of the statute. See Mass. Gen. Laws ch. 31, § 23 (1966); Acts 1922, ch. 463; Acts. 1919, ch. 150, § 2; Acts 1895, ch. 501, § 2. Although the 1895 statute on its face appears to exempt women from the operation of the veterans' preference with respect to all available jobs, the prior and subsequent legislative history suggest that the statutory language was merely consistent with the pre-existing rule permitting single sex lists. See Civil Service Rule XIX(3) promulgated pursuant to Stat. 1884, Ch. 320. If a request were made for a female applicant, the Commissioner had no authority to certify a male for the position, regardless of his veteran status. Op. Att'y Gen. 68 (1941). In 1971, the legislature repealed this statutory exemption. Acts 1971, ch. 219.

In practical application, the combination of federal military enrollment regulations with the Veterans' Preference is a one-two punch that absolutely and permanently forecloses, on average, 98% of this state's women from obtaining significant civil service appointments.

Anthony v. Commonwealth, supra, at 498.

We must also assume that the legislature was cognizant of the fact that the stringent entry criteria embodied in the federal military regulations bore "no demonstrable relation to an individual's fitness for civilian public service." *Id.* at 498-99. We realize that a due process or equal protection claim is not to be judged by the standards applicable under Title VII. *Washington v. Davis, supra*, at 239. Our holding that the Massachusetts civil service selection process is unconstitutional is not based solely on the fact that it bears no relationship to job performance. But the fact that the criteria set forth in the challenged statutory formula fail to measure job performance is one additional circumstance bearing on the question of discriminatory intent.¹⁰

Statistics show that the exemption operated only to preserve stereotypically "female" clerical jobs for women. See 415 F. Supp. at 488. Contrary to defendants' assertion, elimination of this exception did not remove the last vestiges of sex discrimination from the statutory scheme; it only served to make all positions in the civil service subject to the overriding preference formula. See Comment *Veterans' Public Employment Preference as Sex Discrimination*, 90 Harv. L. Rev. 805, 812 (1977); Fleming and Shanor, *Veterans' Preferences in Public Employment: Unconstitutional Gender Discrimination?*, 26 Emory L.J. 13, 53 (1977).

¹⁰It is significant to note that the Court in *Davis* adopted the finding of the district court that the challenged test "directly related to the requirements of the police training program." 426 U.S. at 235.

Finally, the statistical evidence presented by plaintiff demonstrates a pattern of exclusion of women from the civil service.¹¹ At the time the suit was filed, only 2% of Massachusetts veterans were women.¹² Although 43% of the civil service appointees were women, a large percentage of them served in lower grade positions for which men traditionally did not apply. Of the women appointed over a ten year period, from July 1, 1963 through June 30, 1973, only 1.8% were veterans, while 54% of the men had veteran status. 415 F. Supp. at 488.

The facts demonstrate that this absolute job preference formula had a devastating impact on the plaintiff's attempts to advance her position in the civil service. In 1971, she received the second highest test score for the position of Assistant Secretary to the Board of Dental Examiners, but was ranked sixth on the list of eligibles, behind five male veterans, four of whom had received lower scores. She was not certified and a male veteran with a lower examination score was appointed.

Two years later when she applied for another administrative post, plaintiff received the third highest mark on the exam, but only ranked fourteenth on the list, behind twelve

¹¹ Plaintiff argues that this statistical presentation of itself creates a presumption of purposeful discrimination, thereby shifting the burden of proof to defendants. See *Castaneda v. Partida*, 430 U.S. 482 (1977); *Washington v. Davis*, 426 U.S. 229, 241 (1976). In view of our subsidiary and ultimate findings and conclusions, based on an uncontradicted record, concerning the existence of discriminatory intent, we conclude that plaintiff has met her burden of proof without the benefit of a presumption and, therefore, find it unnecessary to address this procedural issue.

¹² At oral argument the parties stated that there is no reason to revise the agreed statement of facts submitted in *Anthony*. Moreover, there is no reason to assume that the facts have changed measurably, inasmuch as the challenged statute has not been in effect due to passage of the interim point preference statute. See n. 2, *supra*.

male veterans, eleven of whom had lower test scores. Again, plaintiff was not certified for appointment. The third time she applied for an administrative position, plaintiff received a score that would have placed her within the top twenty places on the eligibles list. By operation of the formula, however, she was ranked 70th on the list, behind 50 male veterans with lower test scores. *Id.* at 497-498.

These figures, and others cited in our earlier opinion,¹³ show a clear pattern of exclusion of women from competitive civil service positions. Unlike the defendants in *Davis*, the Commonwealth has not made any showing of affirmative efforts to recruit women, or of a recent rise in the percentage of women appointed to competitive civil service positions. In *Davis* the district court found that 44% of the new police recruits over the preceding three years had been black, a figure roughly approximating the proportion of blacks in the area. That court also found that the Department had "systematically and affirmatively sought to enroll black officers, many of whom passed the test but failed to report for duty." 426 U.S. at 236.

The situation here is in marked contrast. The Commonwealth's proffered 57-43 ratio of men to women is misleading. A large percentage of female positions for which males traditionally have not applied. Some women received their appointments through a now defunct practice by which the appointing authorities would requisition only women applicants for certain jobs. 415 F. Supp. at 488.¹⁴ While the officials in *Davis* sought "systematically" to recruit minorities who had passed the preemployment test, the defendants here have demonstrated no attempt to mitigate the permanent and absolute impact on women of a formula that systematically excludes them from desirable public service positions even

¹³ See 415 F. Supp. at 488, 491-92, 497-98.

¹⁴ See n. 10, *supra*.

though they have demonstrated their qualifications by passing a written exam.¹⁵

The Commonwealth argues that,

historical analysis makes it clear that the enactment of this legislation by the General Court was in no way motivated by a desire to discriminate against women. Rather, the legislative motivations for Massachusetts Veterans' Preference statutes were: (1) to reward those who have sacrificed in the service of their country; (2) to assist veterans in their readjustment to civilian life; and (3) to encourage patriotic service.

Brief for Defendants at 24, 25.

We disagree. It is clear that the Commonwealth's motive was to benefit its veterans. Equally clear, however, is that its intent was to achieve that purpose by subordinating employment opportunities of its women. The course of action chosen by the Commonwealth had the inevitable consequence of discriminating against the women of this state. See *Anthony v. Commonwealth*, *supra*, at 496. The fact that the Commonwealth had a salutary motive does not justify its intention to realize that end by disadvantaging its women.

Davis does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory

¹⁵ We recognize that "(m)ere absence of recruitment efforts, by itself is not equivalent to an intent to discriminate," *Guardians Assoc. of the New York City Police Dept. v. Civil Service Comm'n*, 431 F. Supp. 526, 535 (S.D. N.Y. 1977). We emphasize that our finding of discriminatory intent is not based solely on the Commonwealth's failure to show affirmative efforts to recruit women. This is merely one of the factors we rely on in considering the totality of the circumstances.

purposes. Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision solely by a single concern, or even that a particular purpose was the "dominant" or "primary" one.

Village of Arlington Heights v. Metropolitan Development Housing Corp., *supra*, at 265. (Footnotes omitted.)

The fact that there are less drastic alternatives available to the state to achieve its purpose of aiding veterans,¹⁶ underscores our conclusion that the absolute and permanent preference adopted by the Commonwealth resulted from improper evaluation of competing considerations. By intentionally sacrificing the career opportunities of its women in order to benefit veterans, the Commonwealth made a constitutionally impermissible value judgment.

We reaffirm our holding that the Massachusetts Veterans' Preference Act denies equal protection under the law and, therefore, is unconstitutional.

JOSEPH L. TAURO,
District Judge.

CAMPBELL, *Circuit Judge* (concurring). This is not an easy case to deal with under *Washington v. Davis*, 426 U.S. 229 (1977). On the other hand, there can be no question about the unequal impact of this law: practically speaking, it permanently shuts off whole areas of state employment to women. On the other hand, as Judge Murray points out in his dissent,

¹⁶ *Anthony v. Commonwealth*, 415 F. Supp. 485, 499 (D. Mass. 1976).

a strong initial case can be made for the proposition that it is "neutral on its face," and not motivated in any ordinary sense by a discriminatory intent.* Arguably, therefore, the challenged statute is the kind of law which, notwithstanding its widespread impact on women's employment opportunities, should be upheld as constitutional. The thrust of *Washington v. Davis* and related decisions such as *Village of Arlington Heights v. Metropolitan Housing Corporation*, 429 U.S. 252 (1977), is that we must accept that well-intentioned programs may have uneven side effects: society is too complicated for every discriminatory consequence to disqualify legitimate policies. Welfare programs, for example, foreseeably benefit minority groups disproportionately, just as tax deductions do whites. Examinations (as in *Washington v. Davis*) designed reasonably to weed out those unqualified for police work, may eliminate minority applicants more than others. Town and city planning laws, designed to improve community life, may because of separate economic factors, create barriers to minorities. Society would soon be in a state of paralysis if it could adopt only laws having strictly equal impact upon all groups and classes within it.

But while I fully recognize not only that *Washington v. Davis* is the law of the land but also that its principle reflects an essential limitation upon the sweep of the equal protection clause, I do not believe that the Massachusetts veterans prefer-

* The statute can be called facially neutral in that it does not make a division based strictly on sex. The law provides employment preference for veterans, not males. While veterans are 98% male, a few veterans are female, and there are many males who are not veterans.

The statute can likewise be said not to be based on a discriminatory intent, in the sense that no one thinks that it was enacted as a pretext to harm women. While the harm to female employment opportunities is extensive and, given the statutory scheme, inevitable, it was not this harm which prompted passage of the law, but rather the entirely justifiable desire to aid individuals who had served their country, often at great sacrifice.

ence law actually falls within its ambit. This, as Judge Tauro convincingly demonstrates, is no ordinary statute having merely an incidental unequal impact. It is a statute which goes a long way towards making upper level state employment a male preserve. Upon close inspection, the seeming "neutrality" of the veterans preference law, and even its seeming absence of intentional discrimination, are both open to serious question.

I turn first to the matter of its neutrality. While the dividing line between veterans and non-veterans is not the same as the dividing line between men and women, the ineluctable effect of this law is to confer an absolute priority upon a class that is 98% male in a sphere of employment where women, generally, should have the same access as men. What the law does, is to take a group which has, for unique reasons, been selected almost exclusively from the male population (military service being what it was and is), and grant it an absolute preference in an entirely different sphere of public employment where male preference is not only not the rule but is constitutionally impermissible. The law may be "facially neutral" in the limited sense that it is not based overtly on selection by sex, but since the preferred class is 98% male the effect is virtually the same as if it were.

The discriminatory impact in *Washington v. Davis* was far less inevitable: the selection device at issue, a police examination, did not mandate the recruitment of a class made up, overwhelmingly, of whites. While past experience might have indicated that proportionately fewer blacks than whites would pass the neutral examination, this was not an inevitable outcome: a black who was determined to succeed might by dint of extra effort make up for past disadvantages; coaching and recruiting measures, as well as educational and economic improvements, might, over the years, increase the number of successful blacks. No such opportunity exists here for women.

The veterans preference law prefers an already established class which, as a matter of historical fact, is 98% male. Because only persons who have served during wartime are eligible for the preference, the class cannot be expanded in the near future to include more women. Thus its "neutrality" is at best skin-deep. The law was sexually skewed from the outset, since the exclusionary effect upon women was not merely predictable but absolutely inescapable and "built-in".

This same inevitability of exclusionary impact upon women also undermines the argument of no discriminatory intent. There is a difference between goals and intent. Conceding, as we all must, that the goal here was to benefit the veteran, there is no reason to absolve the legislature from awareness that the means chosen to achieve this goal would freeze women out of all those state jobs actively sought by men. To be sure, the legislature did not wish to harm women. But the cutting-off of women's opportunities was an inevitable concomitant of the chosen scheme — as inevitable as the proposition that if tails is up, heads must be down. Where a law's consequences are *that* inevitable, can they meaningfully be described as unintended? Doubtless the impact on women, if considered at all, was regarded as an acceptable "cost" of aiding veterans. But may society properly elect to aid veterans or any other group at the cost of abolishing equal employment opportunities in a major segment of public employment? In my view, the answer is "no".

This is not to say that society may not bestow benefits upon veterans. But I think it may not construct a system of absolute preference which makes it virtually impossible for a woman, no matter how talented, to obtain a state job that is also of interest to males. Such a system is fundamentally different from the conferring upon veterans of financial benefits to which all taxpayers contribute, or from the giving to them of some degree of preference in government employment, as

under a point system, as a *quid pro quo* for time lost in military service. The latter measures do not impose unfairly upon one segment of our society; the instant law, in contrast, forces women to pay a disproportionate share of the cost of benefiting veterans by sacrificing their own chance to be selected for state employment.

Thus while it is concededly a close question whether the Massachusetts veterans preference is to be regarded as the sort of neutral classification with unintended effects absolved by *Washington v. Davis*, I feel on balance that it is not. Rather the law is more realistically viewed as substantively non-neutral. The destruction of normal female opportunities in the state employment system is too evident a consequence of the super-imposition of veterans as an absolutely preferred class upon that system. If this can be done constitutionally, the equal protection clause of the Constitution is, in this area of employment, little more than a hollow pretense, whatever it may remain in theory. As I think the unique problem posed in this case is distinguishable from any contemplated in *Washington v. Davis*, I adhere to our former judgment.

LEVIN H. CAMPBELL,
U.S. Circuit Judge.

MURRAY, Senior District Judge (Dissenting). *Washington v. Davis*, 426 U.S. 229, 239, 242 (1977) holds:

. . . [O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact. [Emphasis in original.]

.

. . . [W]e have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another.

The majority today determines that *Washington v. Davis*, *supra*, supports their previous holding that the Massachusetts Veterans' Preference statute, Mass. Gen. Laws ch. 31, § 23, deprives women of equal protection of the laws in violation of the Fourteenth Amendment in all areas of civil service employment in the Commonwealth. Although recognizing that "[a] facially neutral statute may not be deemed vulnerable to equal protection challenge solely because it has a disproportionate impact", *ante* at 8, Judge Tauro reaches this determination by finding that "[w]e are dealing here with a statute that is not facially neutral", *ante* at 13, fn. 7, and that it is the Commonwealth's intent to achieve the purpose of benefiting its veterans "by subordinating employment opportunities of its women". *Ante* at 20. Judge Campbell concurs in the judgment of unconstitutionality, finding that the inevitability and degree of disproportionate effect make the statute non-neutral and that the inevitability of effect suggests discriminatory intent. With respect, I disagree that these findings and the result reached are demonstrably tenable.

I

The Veterans' Preference statute is not on its face gender-based. *Anthony v. Commonwealth of Massachusetts*, 415 F. Supp. 485, 501 (1976) (Campbell, C.J., concurring). Clearly the statutory "division between veterans and non-veterans is not drawn along sex lines and does not provide for dissimilar

treatment for similarly situated men and women. On its face the statute is neutral . . .". *Id.* at 503 (Murray, J., dissenting). Most persons favored by the statutory preference are males, although a substantial number of those not so favored are also males. Non-veteran women in larger numbers share with non-veteran men the disfavor of the statute, but a number of those aided by the statute indeed are women. The statute explicitly includes women in its requirement for service during time of war, but not combat duty. Mass. Gen. Laws ch. 4, § 7, cl. 43; ch. 31, § 21; 1958 Op. Atty. Gen., 25-26. Although in operation it favors males in greater proportion than females for the higher civil service positions,¹ the statutory classification has not been shown to be a mere pretext to accomplish the purpose of invidiously discriminating against women. See *Geduldig v. Aiello*, 417 U.S. 484 (1974); *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976). Moreover, it is not disputed that the statutory preference was not enacted for the purpose of disqualifying women from receiving civil service appointments. *Anthony v. Commonwealth of Massachusetts*, *supra* at 495.

The attempted distinction between the test in *Davis* and the statute here is totally unconvincing: one is no more neutral than the other. In each case the classification is facially neutral, and in operation the effects are uneven; the only difference is that the statute here has a weightier impact on the

¹ Unequal treatment of plaintiff's interest in the opportunity for public employment under a statute serving ends otherwise within the power of the state to pursue, violates no fundamental interest guaranteed to plaintiff by the federal constitution. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976). Since the statute here is neutral on its face, and since it is undisputed that the statute was not enacted to harm women, the statutory scheme to benefit veteran men and women in the area of public employment to the disadvantage of non-veteran men and non-veteran women does not offend the equal protection clause of the Fourteenth Amendment.

relevant group, and impact alone is not determinative, *Washington v. Davis*, *supra*, at 239.²

II

In *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 264-266 (1977), the Court said:

Our decision last Term in *Washington v. Davis*, 426 U.S. 229 (1976), made it clear that official action will not be held unconstitutional solely because it results in a racially disproportionate impact. "Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination." *Id.*, at 242. *Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause . . .* [Emphasis supplied.]

. . . [I]t is because legislators . . . are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality. But racial discrimination is not just another competing consideration. When there is a *proof that a discriminatory purpose has been a motivating factor in the decision*, this judicial deference is no longer justified. [Emphasis supplied.]

The record before the court, to the extent that it provides direct and circumstantial evidence of intent, does not show,

²Judge Campbell states this result is an "unescapable and 'built-in'" feature of the law, *ante* at _____. But in weighing his argument that the statute is for that reason, *inter alia*, impermissibly discriminatory against women, it cannot be overlooked that the unfavorable impact of the statute is shared alike by non-veteran women and a large number of non-veteran men.

the operation of the statute and its effect to be a clear pattern, unexplainable on grounds other than an intent to limit the employment opportunities of women. This is so, whether the relevant facts are viewed totally or separately. Conceding the factor of unequal impact and that it was foreseeable, a showing of unconstitutional action has not been made. Even in *Davis* the government officials there might well have foreseen that blacks would not do so well on the test as whites. See *Boston Chapter, N.A.A.C.P. v. Beecher*, 504 F.2d 1017, 1021 (1st Cir. 1974). Awareness on the part of the legislature that disproportionate impact is not enough.³ Awareness, like foreseeability, is not proof of discriminatory intent, and other evidence is required. The legislative history of the statute with its unequal impact on women is clearly explainable as having the purpose of preferring qualified veterans for consideration for civil service jobs.⁴

³See the concurring opinion of Mr. Justice Stewart, joined by Mr. Justice Powell, in *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 180 (1977):

That the legislature was aware of race when it drew the district lines might also suggest a discriminatory purpose. Such awareness is not, however, the equivalent of discriminatory intent.

⁴The effect of certain statutory enactments would appear to be protective of women. See St. 1895, c. 501, § 1 and St. 1896, c. 517, § 2. Each sets out details of the preference and concludes: "But nothing herein contained shall be construed to prevent the certification and employment of women." See Opinion of the Justices, 166 Mass. 589, 592-593 (1896). The legislature in 1971 revised the provision allowing single sex requisitions, with the result that the number of "women's" jobs protected from the preference was severely limited, but the purpose of the revision would appear to be the prevention of occupational sex discrimination: the statute allows single sex requisitions only after approval has been obtained from the Massachusetts Commission Against Discrimination. Mass. Gen. Laws ch. 31 § 2A(e). See also G. Blumberg, *De Facto and De Jure Sex Discrimination Under the Equal Protection Clause: A Reconsideration of the Veterans' Preference in Public Employment*, 26 Buff. L. Rev. 3, 38 (1976-77).

The preference statute is not vulnerable to the claim that discriminatory intent may be inferred because there is no relationship between the preference and job performance. In the first place, the contention of no such relationship is open to dispute, see *Feinerman v. Jones*, 356 F. Supp. 252, 260 (M.D. Pa. 1973), but even if that contention were to prevail, it would bear on intent only if job performance were the *only* goal the legislature could serve by means of the preference. That is obviously not the case here, for it is in the national interest that enlistment in the armed service be encouraged, see e.g., H. Rpt. No. 93-857, 93rd Cong., 2d Sess. (1974) (Armed Forces Enlisted Personnel-Bonus Revision Act of 1974), and hiring preferences are well-established means for furthering that purpose. See, e.g., *Anthony v. Commonwealth*, *supra* at 496, 497; 42 U.S.C. § 2000e-11.

The statistical evidence presented by plaintiff provides no support for an inference of a discriminatory purpose. This is an impact argument, and *Arlington Heights* (and *Davis*) requires proof of intent as "a motivating factor". Plaintiff's systematic exclusion argument analogizes the jury-selection cases, but those cases do not apply in the context of this case. *Arlington Heights* pointed out that "[b]ecause of the nature of the jury-selection task, however, we have permitted a finding of constitutional violation even when the statistical pattern does not approach the extremes of *Yick Wo* [v. Hopkins, 118 U.S. 356 (1886)] or *Gomillion* [v. Lightfoot, 364 U.S. 339 (1960)] . . .". 429 U.S. at 266, n.13.⁵ Whatever the exact

⁵The Court may be referring to the difference between an inference of intent from the cumulative impact of a series of administrative determinations and an inference from the impact of a rule promulgated by prior legislative or administrative action, see *Shield Club v. City of Cleveland*, 14 E.P.D. ¶ 7763 (N.D. Oh. 1976); it may be referring to the presumption, more likely in jury cases than in other cases, that the result of selection will be random, see J. Ely, *Legislative and Administrative Motivation in Constitution Law*, 79 Yale L.J. 1205, 1263-66.

focus of the Court in jury-selection cases, the Court makes it clear that even in those cases impact alone is determinative only when it emerges as "a clear pattern, unexplainable on grounds other than race", *Arlington Heights*, *supra* at 266. The facts here do not fit into that mold: it is undisputed that the preference here is based on a determination to help veteran men and women and not non-veterans.

Plaintiff's reliance on *Castaneda v. Partida*, 430 U.S. 482 (1977), which Judge Tauro finds no need to address, *ante* at 16, n.11, is distinguishable from the case before us. In that case statistics were used to show that the number of Mexican-Americans on certain grand juries normally to be expected, had the jurors been chosen randomly, was so much higher than the actual number of Mexican-Americans called that plaintiff had made out a prima facie case of equal protection violation. The statistics were presented in the context of the operation of the "key man" system of jury selection which allows jury commissioners to select jurors from a list on which Spanish surnames are easily identifiable, and the system is thus "susceptible of abuse". 430 U.S. at 497, 484-85, 495. No evidence was presented by the State, and the Court recognized that there would be no constitutional violation were the State to explain the numerical discrepancy on neutral grounds. As pointed out above, the preference statute is clearly explainable as having the purpose of preferring veteran men and women at the expense of non-veteran men and women.

III

The principle applied in tort and criminal actions, that an actor is presumed to intend the natural and foreseeable consequences of his deeds, must yield to the entirely different considerations at work when a federal court is addressing an equal protection challenge to state legislation. Principles of

federalism involve a "recognition of the value of state experimentation with a variety of means for solving social and economic problems", *Anthony, supra* at 502 (Murray, J., dissenting), and considerations of federalism require that an impermissible motive in enacting state legislation be not lightly inferred. See Note, *Developments in the Law: Equal Protection*, 82 Harv. L. Rev. 1065, 1093-94, n.101; A. Bickel, *The Least Dangerous Branch*, 214; P. Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motivation*, 1971 Sup. Ct. Rev. 95, 129-30. Inevitability of effect, even coupled with disproportionate impact, "absent a pattern as stark as that in *Gomillion* or *Yick Wo*" is not evidence of discriminatory purpose or intent.⁶ See *Davis, supra* at 242; *Arlington Heights, supra* at 266. A legislature's choice of preferring veterans implies invidious intent only if it appears inconsistent with expected and valid considerations.⁷

⁶ The heart of Judge Campbell's argument is the following:

To be sure, the legislature did not wish to harm women. But the cutting-off of women's opportunities was an inevitable concomitant of the chosen scheme — as inevitable as the proposition that if tails is up, heads must be down. Where a law's consequences are *that* inevitable, can they meaningfully be described as unintended?

Ante at ____ The answer to his question must be that inevitability of effect is relevant only where it bears on intent, and to find intent as that word is used in *Washington v. Davis* one must find motive. Judge Campbell concedes that "[w]hile the harm to female employment opportunities is extensive and, given the statutory scheme, inevitable, it was not this harm which prompted passage of the law . . .". *Ante* at ____, n. *. Where, as here, a law's consequences were inevitable, but there is no evidence at all that those particular consequences motivated the legislature, they can indeed be described as unintended.

⁷ See P. Brest, *supra*, 1971 Sup. Ct. Rev. at 121-122; Note, *Reading the Mind of the School Board: Segregative Intent and the De Facto/De Jure Distinction*, 86 Yale L.J. 317, 332-43 (1976).

In most hiring situations the difference in the scores of those certified would likely be very little different were the veterans' preference not in effect.⁸ There is here no indication that the legislature departed from usual considerations in enacting the preference. To the extent, however, that the legislature wishes to use civil service hiring practices to favor veterans, any effort to diminish the impact on women by diluting the preference necessarily results in a diminution of the benefit to veterans. Because of this nature of the hiring benefit, use of the "absolute" preference instead of a point preference, like the use of any preference at all, provides no ground for indictment of the legislature's motive.

IV

Since *Washington v. Davis*, three veterans' preference provisions have been subjected to equal protection challenge; all

⁸ For one of the positions applied for by plaintiff, that of Solomon Head Administrative Assistant, the three applicants certified, of whom one would be chosen, had scores of 77.40, 93.28, and 90.20. Without the veterans' preference, the top three scores would have been 94.88, 93.28, and 92.32 (plaintiff). Agreed Statement of Facts (hereinafter "Statement") ¶¶ 12, 13, Exhibits, 2, 4. For another position, that of Administrative Assistant, there were seven positions available. Eleven persons would be certified, Statement ¶ 9, and were the top eleven all to indicate interest, the positions would be filled from a group with scores of 88, 86, 86, 84, 94, 92, 92, 92, 90, 90, and 90. Without the preference, the selections would be from a group with scores of 94, 92, 92, 92, 91, 90, 90, 90, 90, 89, and 89. Statement ¶¶ 16, 17, Exhibit 7. For a third position, Assistant Secretary, Board of Dental Examiners, the top three scores were 89.72, 78.08, and 83.64; without the preference, the top three scores would have been 89.72, 86.68 (plaintiff), and 83.98. Statement ¶ 27, Exhibit 61. That the appointee for this position had a score of 78.08, the lowest of the three certified, indicates that there are other important qualifications besides test scores and thus that there is little reason to believe that the quality of the employee pool is significantly lowered by its containing persons with slightly lower test scores than would be present absent the veterans' preference statute.

three have been upheld. *Bannerman v. Dept. of Youth Authority*, 436 F. Supp. 1273 (N.D. Cal. 1977); *Branch v. DuBois*, 418 F. Supp. 1128 (N.D. Ill. 1976); *Ballou v. State, Dept. of Civil Service*, 372 A.2d 333 (N.J. App. Div. 1977), *aff'd*, 46 U.S.L.W. 2454 (N.J. 1978). Three of the decisions distinguish *Anthony v. Commonwealth*, *supra*, as having been based on a stronger negative effect on women than those courts faced. The California court, however, states that the approach used in *Anthony* was "rejected in *Washington v. Davis*", *Bannerman*, 436 F. Supp. at 1280. Each court had little trouble in concluding that no intent to harm women was present, even in the "absolute" preference at issue in New Jersey. The Illinois court's language is representative.

While those who never served in the armed forces, those who served at times not within the statutory periods and women who are not veterans suffer a disadvantage in hiring and promotion, this is an incidental result of a statute intended to reward veterans and not one intended to discriminate against men and women who are not veterans or those whose service was in times of limited military action.

Branch v. DuBois, 418 F. Supp. at 1133.⁹

⁹This court would seem to have agreed in its earlier opinion, where the majority stated that

[t]he Massachusetts Veterans' Preference was not enacted for the purpose of disqualifying women from receiving civil service appointments.

Anthony v. Commonwealth of Massachusetts, 415 F. Supp. 485, 495 (1976). Nowhere in his opinion has Judge Tauro said that the Massachusetts legislature intended to harm job opportunities for women or that limiting

The impact of the statute at issue here does not approach the extremes described in *Arlington Heights*, *supra* at 266, and plaintiff must prove intent by other evidence. This she has not done. The question: Would the veterans' preference statute have been enacted if women were represented in the armed services in such numbers that the preference would have no discriminatory effect? has not been addressed by plaintiff, and she has given the court absolutely no reason to answer this question in the negative. She has failed to make out a *prima facie* case of discriminatory intent. See *Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S. 274, 287 (1977). In light of *Washington v. Davis* I would not hold, as the majority does, that the Massachusetts Veterans' Preference statute violates the Equal Protection Clause of the Fourteenth Amendment. I dissent.

FRANK J. MURRAY,
Senior District Judge.

such opportunities was a motive in enactment of the legislation, and that, of course, is precisely what must be shown. All Judge Tauro will say is that the legislature's "clear intent was to benefit veterans even at the expense of women", *ante* at 7. This says nothing about motive and is entirely consistent with a finding that the legislature saw the impact on women as extremely regrettable but unavoidable.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS.

HELEN B. FEENEY,
PLAINTIFF,

v .

CIVIL ACTION
No. 75-1991-T

THE COMMONWEALTH OF
MASSACHUSETTS, ET AL.,
DEFENDANTS,

Notice of Appeal to the Supreme Court
of the United States.

Notice is hereby given that the Defendants, acting by and through their attorneys and pursuant to Supreme Court Rule 10, hereby appeal the judgment of this Court to the Supreme Court of the United States. In accordance with the provisions of Supreme Court Rule 10(2), the Defendants specify:

1. The parties taking the appeal are the Personnel Administrator of the Commonwealth (referred to as the Massachusetts Director of Civil Service in the pleadings) and the members of the Massachusetts Civil Service Commission, who are collectively referred to herein as the Defendants;

2. Defendants appeal from paragraph 2 of the Judgment and Order of the Court entered on May 3, 1978, and from subparagraph (a) of the order enjoining Defendants from utilizing Mass. Gen. Laws c. 31, § 23 (1971) (The Massachusetts Veterans' Preference Act) in any future selection of persons to fill civil service positions with the Commonwealth; and

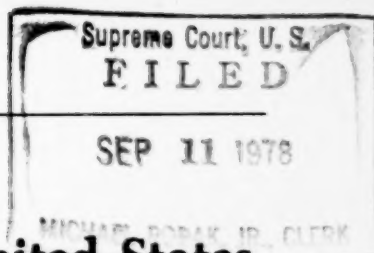
3. Direct appeal to the Supreme Court of the United States is authorized by 28 U.S.C. 1253.

Respectfully submitted,
By Their Attorneys,
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DATED: June 13, 1978.

[Certificate of Service omitted in printing.]

**In the
Supreme Court of the United States.**



OCTOBER TERM, 1978.

No. 78-233.

PERSONNEL ADMINISTRATOR OF THE
COMMONWEALTH OF MASSACHUSETTS ET AL.,
APPELLANTS,

v.

HELEN B. FEENEY,
APPELLEE.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS.

MOTION TO AFFIRM.

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**In the
Supreme Court of the United States.**

OCTOBER TERM, 1978.

No. 78-233.

PERSONNEL ADMINISTRATOR OF THE
COMMONWEALTH OF MASSACHUSETTS ET AL.,
APPELLANTS,

v.

HELEN B. FEENEY,
APPELLEE.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS.

MOTION TO AFFIRM.

Pursuant to Rule 16 of the Rules of this Court, Helen B. Feeney moves that the judgment of the United States District Court for the District of Massachusetts be affirmed.

Question Presented.

Does Mass. Gen. Laws c. 31, § 23, which bars women from civil service positions by granting a permanent and absolute preference to veterans, violate the Fourteenth Amendment to the Constitution of the United States?

Statement.

This is a direct appeal under 28 U.S.C. § 1253 from the final judgment and order of a three-judge district court in the United States District Court for the District of Massachusetts holding that Massachusetts' absolute preference of veterans for civil service employment violates the Equal Protection Clause of the Fourteenth Amendment and enjoining the enforcement of Mass. Gen. Laws c. 31, § 23 (1971).

The action in the district court was brought under 42 U.S.C. § 1983 by Helen B. Feeney, the appellee here, against the Commonwealth of Massachusetts, its Division of Civil Service, the Director of Civil Service and the members of the Massachusetts Civil Service Commission.¹ The plaintiff, who had been excluded from consideration for numerous civil service positions as a result of the use of the absolute veterans' preference formula, alleged that the statutory scheme by granting an absolute preference to a class which was almost exclusively male discriminated against women.

¹ The state position of Director of Civil Service has been eliminated and the duties transferred to the position of Personnel Administrator of the Commonwealth of Massachusetts, which position is presently held by Wallace Kountze. The current members of the Civil Service Commission are Amelia W. Miclette, Wayne A. Budd, John F. Donegan, Ruth M. MacRobert and Richard H. Linden.

The plaintiff's action was consolidated with a previously filed action challenging the same statutory scheme. The parties submitted a lengthy statement of facts in each case describing in detail the Massachusetts civil service system and the operation of the veterans' preference statute within that system, the number of men and women employed in civil service positions in Massachusetts and the restrictions on service in the armed forces by women. The district court also considered the affidavit of the plaintiff, describing her efforts over the years to obtain appointment to various civil service positions, and the affidavit of Edward W. Powers, a former Director of Civil Service and a named defendant, in which he conceded that the veterans' preference statute drastically restricts employment opportunities for women in Massachusetts' civil service.

On March 29, 1976, the district court entered an order and opinion awarding judgment in favor of plaintiff Feeney against the named individual defendants.² The opinion is reported as *Anthony v. Commonwealth of Massachusetts*, 415 F. Supp. 485 (D. Mass. 1976) ("*Anthony*"). The district court, after carefully reviewing the facts, concluded that the veterans' preference formula, given the virtual exclusion of women from the armed forces, "inescapably" leads to the denial to women of any meaningful opportunity to compete for civil service jobs and held that the statute was unconstitutional.

On August 23, 1976, the Attorney General docketed an appeal (No. 76-265) in this Court on behalf of the Personnel Administrator of the Commonwealth of Massachusetts and the members of the Civil Service Commission. This Court certified to the Supreme Judicial Court of Massachusetts a question relating to the authority of the Attorney General to pros-

² The Commonwealth of Massachusetts and the Division of Civil Service were dismissed as parties on the grounds that they were not "persons" within the meaning of 42 U.S.C. § 1983.

ecute the appeal. 429 U.S. 66 (1976). After receipt of the state court's response, dated September 16, 1977, and unofficially reported at 366 N.E.2d 1262 (1977), this Court remanded the cause to the district court for further consideration in light of *Washington v. Davis*, 426 U.S. 229 (1976). The order of remand is reported at 434 U.S. 884 (1977).

On remand, the district court ordered the parties to file supplementary briefs addressed to the specific question raised by this Court's order of remand and heard oral argument addressed to that question. Upon reconsideration of the entire record, including the legislative and administrative history of the veterans' preference statute and the Commonwealth's past restriction of employment opportunities for women, the district court, on May 3, 1978, reaffirmed its original judgment in favor of Helen B. Feeney and again permanently enjoined the individual defendants from utilizing Mass. Gen. Laws c. 31, § 23 (1971), in filling civil service positions. In its second opinion, reported as *Feeney v. Commonwealth of Massachusetts*, 451 F. Supp. 143 (D. Mass. 1978) ("*Feeney*"), the district court, following the remand order of this Court, reviewed and analyzed the totality of relevant facts and concluded that there was a discriminatory intent to disadvantage women by the adoption and use of an absolute and permanent preference formula.

Despite the factual finding of a purposeful discrimination against women, the Attorney General again docketed an appeal in this Court on August 10, 1978, on behalf of the Personnel Administrator of the Commonwealth of Massachusetts and the members of the Civil Service Commission.

Argument.

THE JUDGMENT OF THE DISTRICT COURT SHOULD BE AFFIRMED.

I. *The District Court Correctly Found that the Exclusion of Women from Civil Service Positions was Intentional and Purposeful.*

Consistent with the remand order of this Court and the decision in *Washington v. Davis*, 426 U.S. 229 (1976), the district court fully analyzed the "totality of the relevant facts," 451 F. Supp. at 147, to determine whether the discrimination against women caused by adoption and use of an absolute and permanent preference formula was intentional and purposeful. The district court's conclusion was that the Commonwealth of Massachusetts had "... intentionally sacrific[ed] the career opportunities of its women in order to benefit veterans" *Feeney*, 451 F. Supp. at 150. In reaching this conclusion, the district court correctly and properly considered the presence of several factors upon which a finding of a purposeful discrimination appropriately may be based.³

³The appellants erroneously suggest that there must be a finding "that the statute was motivated by an anti-female animus." Jurisdictional Statement, p. 16. Subjective ill-will toward a particular class is not required by *Davis*. Rather, all that is required is a showing that the discrimination is deliberate and purposeful as opposed to incidental or accidental. See *Castaneda v. Partida*, 430 U.S. 482, 494 n. 13 (1977). A requirement of subjective ill-will toward women is particularly inappropriate in cases involving sex discrimination which is more often the product of "paternalistic stereotyping," *Regents of University of California v. Bakke*, ___ U.S. ___, 98 S. Ct. 2733, 2784 (1978) (opinion of Brennan, J.), or a "traditional way of thinking about females," *Califano v. Goldfarb*, 430 U.S. 199, 223 (1977) (Stevens, J., concurring), or "the socialization process of a male-dominated culture." *Kahn v. Shevin*, 416 U.S. 351, 353 (1974).

A. The Devastating Impact on Women's Employment Opportunities.

Although the district court did not base its finding of intentional discrimination solely on the disproportionate impact on the employment opportunities of women, it did consider the disproportionate impact on women to be "highly relevant" to the issue of intentional discrimination. *Feeney*, 451 F. Supp. at 146. This was clearly consistent with this Court's opinion in *Washington v. Davis*, *supra*, 426 U.S. at 242 ("Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another.").

The district court found that the use of the absolute preference formula inescapably caused a "devastating impact" on the employment opportunities of women. *Feeney*, 451 F. Supp. at 149. Without regard to demonstrable individual qualifications, women as a class are effectively barred from all but low-paying jobs shunned by men. "Few, if any, females have ever been considered for the higher positions in the state Civil Service." *Anthony*, 415 F. Supp. at 498.

Thus, the use of an absolute preference guarantees the perpetuation in Massachusetts of decades of discrimination against women. See *Frontiero v. Richardson*, 411 U.S. 677, 684-685 (1973). It operates to make "upper level state employment a male preserve," *Feeney*, 451 F. Supp. at 151 (Campbell, J., concurring), while "female appointees are generally clerks and secretaries, lower-grade and lower-paying positions for which men traditionally have not applied." *Anthony*, 415 F. Supp. at 498.

The absolute preference formula causes a "near blanket, permanent exclusion of all women from a major sector of employment." *Anthony*, 415 F. Supp. at 501 (Campbell, J.,

concurring). Such a devastating and destructive impact on women's employment opportunities in itself provides a proper inference of purposeful discrimination. See *Castaneda v. Partida*, 430 U.S. 482, 494 n. 13 (1977) ("If a disparity is sufficiently large, then it is unlikely that it is due solely to chance or accident, and, in the absence of evidence to the contrary, one must conclude that racial or other class-related factors entered into the selection process."); cf. *NLRB v. Great Dane Trailers*, 388 U.S. 26, 33-34 (1967).

The district court also found "a clear pattern of exclusion of women from competitive civil service positions." *Feeney*, 451 F. Supp. at 149. This type of systematic adverse exclusion of an identifiable class is expressly recognized by this Court as an appropriate basis from which to infer intentional discrimination. *Washington v. Davis*, *supra*, 426 U.S. at 241 ("It is also clear . . . that the systematic exclusion of Negroes is itself such an 'unequal application of the law . . . as to show intentional discrimination.'"); *Akins v. Texas*, 325 U.S. 398, 403-404 (1945) ("A purpose to discriminate must be present which may be proven by systematic exclusion . . ."); see also *Snowden v. Hughes*, 321 U.S. 1, 9 (1944); *Eubanks v. Louisiana*, 356 U.S. 584, 587 (1958); *Sangmeister v. Woodard*, 565 F. 2d 460, 467 (7th Cir. 1977), *appeal dismissed and cert. denied sub nom. Illinois State Board of Elections v. Sangmeister*, ____ U.S. ____, 98 S. Ct. 1516 (1978).

Thus, the overwhelming and unrebutted evidence of a "devastating" impact on the employment opportunities of women, as well as the "clear pattern of exclusion of women," provided a strong inference of purposeful and intentional discrimination. However, the district court did not base its conclusion of intentional discrimination solely on these disastrous effects on women. Rather, it appropriately considered other relevant factors that evidenced intent.

B. The Non-Neutral Selection Procedure.

Again, following this Court's direction, the district court analyzed whether the selection procedures embodied in the absolute preference formula were neutral with respect to gender. *Washington v. Davis*, *supra*, 426 U.S. at 241 (exclusion of a class plus the use of "non-neutral selection procedures" is sufficient to establish a prima facie case of discriminatory purpose).

The district court found that the "selection formula, geared as it is to veteran status, is necessarily controlled by federal military proscriptions limiting the eligibility of women for participation in the military." *Feeney*, 451 F. Supp. at 145. This lack of neutrality with respect to gender that is inherent in the absolute preference formula appropriately reinforces the conclusion that the discrimination is purposeful. As Judge Campbell observed with respect to the veterans' preference law:

"Thus its 'neutrality' is at best skin-deep. The law was sexually skewed from the outset, since the exclusionary effect upon women was not merely predictable but absolutely inescapable and 'built-in'."

Feeney, 451 F. Supp. at 151 (Campbell, J., concurring).

In stark contrast to the racially neutral selection procedures in *Davis*, which were found not to be "culturally slanted to favor whites," 426 U.S. at 235, the district court found that the absolute nature of the preference rendered qualifications secondary and produced "anything but an impartial, neutral policy of selection, with merely an incidental effect on the opportunities for women." *Anthony*, 415 F. Supp. at 495. Unlike the test in *Davis*, which was "designed to serve neutral

ends," 426 U.S. at 248, the absolute veterans' preference is "a deliberate, conscious attempt on the part of the state to aid one clearly identifiable group . . . at the absolute and permanent disadvantage of another clearly identifiable group, Massachusetts' women." *Anthony*, 415 F. Supp. at 496.⁴

Since the selection criterion is premised on veteran status, a status which women have been intentionally denied through no fault of their own, it is not neutral with respect to gender. The legislature's deliberate choice of an inherently non-neutral selection criterion for civil service positions provides the fair inference that the legislature intended the discriminatory consequences upon the employment opportunities of women.

C. The Inevitability of the Exclusionary Impact on Women.

In addition to the lack of neutrality with respect to gender that is built into the system of absolute preference, the district court also analyzed whether the "official acts or policies" of the defendants "had the natural, foreseeable and inevitable effect of producing a discriminatory impact." *Feeney*, 451 F. Supp. at 147.

Davis makes clear that state officials are not to be held responsible for every incidental and unintended effect of a statute. However, state officials must still be held responsible for the foreseeable and inevitable consequences of their deliberate choices. The basic and familiar principle that an actor intends, and must be held responsible for, consequences which he knew, or should have known, were substantially certain to occur as a result of his actions has long been recognized as an appropriate basis upon which to find an intentional or purposeful discrimination. See *Washington v. Davis*, *supra*, 426 U.S. at 253 (Stevens, J., concurring); cf. *Keyes v. School Dis-*

⁴It is this built-in lack of neutrality which occasioned Judge Tauro's note that the statute is not even facially neutral. *Feeney*, 451 F. Supp. at 147 n. 7.

trict No. 1, Denver, Colo., 413 U.S. 189 (1973); *Monroe v. Pape*, 365 U.S. 167, 187 (1961). Following *Washington v. Davis*, *supra*, the various courts of appeal have reaffirmed the basic principle that intent may be inferred from proof of the foreseeable effects of wilful actions. For example, in *United States v. School District of Omaha*, 565 F. 2d 127 (8th Cir. 1977), *cert. denied*, ___ U.S. ___, 98 S. Ct. 1240 (1978), the court, after remand by this Court, reaffirmed its holding of intentional segregation "because the natural and foreseeable consequence of the acts of the School District was to create and maintain segregation . . ." *Id.* at 128. See also *Arthur v. Nyquist*, 573 F. 2d 134, 142-143 (2d Cir. 1978), and *United States v. Texas Education Agency*, 564 F. 2d 162, 168 (5th Cir. 1977).

In this case, the district court had before it and fully analyzed the legislative and administrative history relating to the absolute preference and civil service selection procedures. *Feeney*, 451 F. Supp. at 148 n. 9. The district court found that the legislative history suggested an awareness of the predictable and inevitable impact on women. *Ibid.* It found also that for 85 years Massachusetts had engaged in deliberate *de jure* discrimination by separately requisitioning for "female" jobs which were "exempt" from application of the preference and that this "exemption operated only to preserve stereotypically 'female' clerical jobs for women." *Feeney*, 451 F. Supp. at 148 n. 9. This long history of *de jure* discriminatory hiring policies, coupled with the legislature's awareness of the inevitable exclusionary impact on women that resulted from applying the absolute preference to all positions, was enough for the district court properly to infer that the consequent exclusion of women was purposeful and intentional. Cf. *Keyes v. School District No. 1, Denver, Colo.*, *supra*, 413 U.S. at 207-208.

Thus, in addition to considering the devastating exclusionary impact of the absolute preference formula upon women, the district court analyzed the legislative and administrative history of the adoption and use of the absolute preference. The district court found that, with awareness of its discriminatory consequences to women, the legislature deliberately chose to adopt a non-neutral selection criterion which was so absolute that it would, not just foreseeably but inevitably, exclude women from consideration for upper-level civil service positions. It found that the state had for 85 years engaged in a clear pattern of exclusion of women and, by use of separate requisitions for women, engaged in *de jure* gender-based discrimination which kept women in stereotypically "female" jobs. Based on these factors and others,⁵ the district court properly concluded that the state's adoption and use of an absolute preference formula constituted an intentional and deliberate discrimination against women.

II. *The District Court Correctly Applied the Standard of Judicial Scrutiny Appropriate for Review of a Statute that Discriminates Against Women.*

Having concluded that the adoption and use of the absolute veterans' preference formula constituted an intentional and purposeful discrimination against women, the district court properly employed the standard of judicial scrutiny originally

⁵The principal grounds upon which the district court based its finding of purposeful discrimination are set forth above. The court also found probative the fact that the legislature enacted a civil service selection process that "bears no relationship to job performance." *Feeney*, 451 F. Supp. at 148. In addition, it noted that the legislature ignored less drastic alternatives to achieve its purposes, which alternatives would not have caused the systematic exclusion of women from upper-level civil service positions. *Feeney*, 451 F. Supp. at 150. See *United States v. Board of School Commissioners of the City of Indianapolis*, 573 F. 2d 400, 413 (7th Cir. 1978).

formulated in *Reed v. Reed*, 404 U.S. 71 (1971), and consistently applied by this Court in cases involving gender-based discrimination. *Anthony*, 415 F. Supp. at 495. See *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Stanton v. Stanton*, 421 U.S. 7 (1975); *Craig v. Boren*, 429 U.S. 190 (1976); *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Califano v. Webster*, 430 U.S. 313 (1977).

This heightened level of scrutiny requires that classifications by gender, in order to withstand constitutional challenge, "must serve important governmental objectives and must be substantially related to achievement of those objectives." *Craig v. Boren*, *supra*, 429 U.S. at 197. This standard of review is triggered by (1) the finding of a gender-based classification⁶ that adversely affects women and (2) a determination that the classification is premised upon or fosters "'old notions' of role typing," *Craig v. Boren*, *supra*, 429 U.S. at 198, or "archaic and overbroad generalizations," *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975), about the role of women or "outdated misconceptions concerning the role of females in the home rather than in the 'marketplace and world of ideas'." *Craig v. Boren*, *supra*, 429 U.S. at 198-199.

The reason that the Court looks more closely at gender-based classifications which result from a "traditional way of thinking about females," *Califano v. Webster*, *supra*, 430 U.S. at 320, is because they "have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members." *Frontiero v. Richardson*, *supra*, 411 U.S. at 687. The old generalizations about women are simply no longer

⁶The gender-based nature of the classification need not "be express or appear on the face of the statute." *Washington v. Davis*, *supra*, 426 U.S. at 241.

consistent "with contemporary reality." *Califano v. Goldfarb*, *supra*, 430 U.S. at 207.

The absolute veterans' preference formula, originally enacted in the 19th century,⁷ continues to foster "old notions" that women should be in the home rather than applying for responsible upper-level positions in state government and that those women who do work should be relegated to lower-level, less responsible positions. The "paternalistic stereotyping" upon which the absolute veterans' preference formula is premised has the effect of "stigmatizing all women with a badge of inferiority." *Regents of University of California v. Bakke*, ___ U.S. ___, 98 S. Ct. 2733, 2784 (1978) (separate opinion of Brennan, J.).

In addition, the absolute preference formula excludes women from significant civil service positions "because of circumstances totally beyond their control," *Anthony*, 415 F. Supp. at 499, and without regard to the individual qualifications of female applicants. *Anthony*, 415 F. Supp. at 498-499. The system of absolute preference "makes it virtually impossible for a woman, no matter how talented, to obtain a state job that is also of interest to males." *Feeney*, 451 F. Supp. at 151 (Campbell, J., concurring). As a result, the district court's use of a heightened level of scrutiny was appropriate. *Cf. Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972).

In applying the heightened scrutiny appropriate for gender-based classifications, the district court necessarily examined the particular means chosen by the state to achieve its objective. It found the choice of an absolute and permanent preference to be a "broad-brush approach" based on "mere administrative convenience." *Feeney*, 451 F. Supp. at 145. The

⁷"[A] discrimination of that vintage cannot reasonably be supposed to have been motivated by a decision to repudiate the 19th century presumption that females are inferior to males." *Califano v. Goldfarb*, *supra*, 430 U.S. at 223 (Stevens, J., concurring).

district court found a total absence of any attempt to tailor the statute carefully to the purposes sought to be achieved.⁸ Noting that "Massachusetts has considerable flexibility in the manner in which it can aid its veterans," *Anthony*, 415 F. Supp. at 499, the district court found that the state had numerous effective alternatives by which it could achieve the very same purpose of aiding veterans but "without doing so at the absolute and permanent expense of its women." *Ibid*. Finding no rational or legitimate reason for the adoption of an absolute and permanent preference, the district court properly concluded that the statute was unconstitutional.⁹

⁸For example, the district court found "[n]o time limit was imposed or attempt made 'to tailor its use to those who have shortly returned to civilian life.'" *Feeney*, 451 F. Supp. at 145, quoting *Anthony*, 415 F. Supp. at 499.

⁹"We determined that the means chosen by the Massachusetts Legislature to reward veterans were not grounded 'on a convincing factual rationale.'" *Feeney*, 451 F. Supp. at 145.

Conclusion.

For the reasons stated herein and by the district court, the judgment of the district court should be affirmed.

Respectfully submitted,

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**In the
Supreme Court of the United States.**

OCTOBER TERM, 1978.

No. 78-233.

**PERSONNEL ADMINISTRATOR OF THE
COMMONWEALTH OF MASSACHUSETTS ET AL.,
APPELLANTS,**

v.

**HELEN B. FEENEY,
APPELLEE.**

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS.**

Brief for the Appellants.

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In the Supreme Court of the United States.

OCTOBER TERM, 1978.

No. 78-233.

PERSONNEL ADMINISTRATOR OF THE
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APPELLANTS,

v.

HELEN B. FEENEY,
APPELLEE.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS.

Brief for the Appellants.

Opinions Below.

The first opinion of the United States District Court for the District of Massachusetts in this cause is dated March 29, 1976, and appears at 415 F. Supp. 485 (App. 195-240). The second opinion of the district court, entered on May 3, 1978, and issued after reconsideration in accordance with this Court's order of remand, appears at 451 F. Supp. 143 (App. 251-279).

A third lower court opinion in this cause, albeit one of limited significance on the issues presented on appeal, was issued by the Supreme Judicial Court of the Commonwealth of Massachusetts on September 16, 1977. That opinion provides an answer to the question certified by this Court concerning the authority of the Attorney General to proceed with an appeal in this case (App. 243-244). It is not yet reported in the official Massachusetts Reports, but appears at 366 N.E. 2d 1262.

Jurisdiction.

The present appeal is from a final order of a three-judge panel of the United States District Court for the District of Massachusetts convened pursuant to 28 U.S.C. §§ 2281 and 2284. That order enjoined the Personnel Administrator and other state officials from utilizing Mass. Gen. Laws c. 31, § 23, in the future selection of persons to fill civil service positions within the Commonwealth. The order was predicated on a finding that Mass. Gen. Laws c. 31, § 23, is unconstitutional. It was entered on May 3, 1978, and the notice of appeal was filed in the district court on June 13, 1978 (App. 280). Appellants filed their jurisdictional statement on August 10, 1978. Probable jurisdiction was noted on October 10, 1978. 47 U.S.L.W. 3239. Jurisdiction of this Court is conferred by 28 U.S.C. § 1253.

Statute Involved.

Although the suits filed in the district court challenged Mass. Gen. Laws c. 31, §§ 21-25, only § 23 was found to be

unconstitutional and it is the sole Massachusetts statute directly before this Court on appeal (App. 193-194). At the time of the first district court opinion¹ Mass. Gen. Laws c. 31, § 23, provided:

The names of persons who pass examinations for appointment to any position classified under the civil service shall be placed upon the eligible lists in the following order:—

(1) Disabled veterans as defined in section twenty-three A, in the order of their respective standing; (2) veterans in the order of their respective standing; (3) persons described in section twenty-three B in the order of their respective standing; (4) other applicants in the order of their respective standing. Upon receipt of a requisition, names shall be certified from such lists according to the method of certification prescribed by the civil service rules. A disabled veteran shall be retained in employment in preference to all other persons, including veterans.

¹ On June 24, 1976, the Governor of the Commonwealth signed into effect Mass. St. 1976, c. 200, a statute establishing an interim veterans' preference statute which would operate only during the pendency of this appeal. Mass. Gen. Laws c. 31, § 23 (Supp. 1978-1979). The interim statute in its currently effective form is set out as an appendix to the jurisdictional statement (J.S. App. 33a).

On January 1, 1979, the Civil Service laws will be recodified by Mass. St. 1978, c. 393, enacted July 12, 1978. Under the recodification, Mass. Gen. Laws c. 31, § 23, will be replaced by the first and last paragraphs of Mass. Gen. Laws c. 31, § 26. The interim veterans' preference statute, Mass. St. 1976, c. 200, also will be amended to reflect the recodification, Mass. St. 1978, c. 393, §§ 41, 42. The amendment will not work any substantive changes in the relevant statutes.

Question Presented.

Does the civil service ranking preference extended to veterans by Mass. Gen. Laws c. 31, § 23, deny female civil service applicants equal protection of the law in violation of the Fourteenth Amendment?

Statement of the Case.

I. PRIOR PROCEEDINGS.

The procedural history of this case is long and relatively complex; the case has already required some form of consideration by this Court on three separate occasions and the merits of the appeal raise questions as to two different district court opinions. The case has proceeded in three distinct stages and this statement is organized accordingly.

A. *The Original District Court Proceedings.*

On November 4, 1974, Carol A. Anthony filed a complaint in the United States District Court for the District of Massachusetts, seeking to enjoin the enforcement of Mass. Gen. Laws c. 31, §§ 21-25.² A three-judge district court was convened to hear the case pursuant to 28 U.S.C. §§ 2281 and 2284 (App. 70).

²Named as party defendants were the Commonwealth of Massachusetts, the Division of Civil Service, the Civil Service Commission and the Director of Civil Service. After commencement of the action but prior to decision, the position of the Director of Civil Service was eliminated and its functions transferred to the Personnel Administrator of the Commonwealth. Mass. St. 1974, c. 835.

The gravamen of the complaint was that the veterans' preference statute deprived the plaintiff of equal protection of the laws because it operated to exclude women from public employment and perpetuated the effect of sex discrimination established by federal regulations concerning military service.

On May 20, 1975, Helen B. Feeney filed a complaint against the same defendants raising the same issues and alleging the same claims as plaintiff in the *Anthony* case. Feeney also sought an order restraining the defendants from making or approving any appointment to any permanent position from the eligible list for positions classified as Administrative Assistant or Head Administrative Assistant at the Solomon Mental Health Center in the Department of Mental Health of the Commonwealth. The requested order further sought extension of the expiration date of the eligible list for the latter position. The order was assented to and duly entered, and on May 23, 1975, the court consolidated the two actions (App. 61).

The defendants moved to dismiss the *Anthony* case as moot because of the passage of an act exempting all attorney positions, including those classified as Counsel I, from the provisions of civil service law. Mass. St. 1975, c. 134. They also moved to dismiss the *Feeney* case for want of subject matter jurisdiction and failure to state a claim upon which relief could be granted. Counsel executed lengthy statements of agreed facts, submitted simultaneous briefs on all issues, and presented oral argument to the three-judge panel on the merits.

On March 29, 1976, the three-judge district court issued the final order and opinions reproduced at 415 F. Supp. 485 (D. Mass. 1976) (App. 195-240). The court found that the claims brought by the plaintiffs in the *Anthony* case were moot. The court further found that neither the Commonwealth of Massachusetts nor the Division of Civil Service were "persons" within the meaning of 42 U.S.C. § 1983 and therefore dis-

missed the complaints against them. No notice of appeal was filed as to these aspects of the final judgment and order.

The court permanently enjoined the remaining defendants³ from utilizing the veterans' preference statute in ranking eligibles for civil service positions within the Commonwealth. The sharply-divided court held that Mass. Gen. Laws c. 31, § 23, had the effect of depriving female civil service applicants of equal protection of the laws and was unconstitutional. The majority opinion based this holding on an analysis of the impact of the statute on female applicants and not on the basis of its purpose. The dissent of Murray, D.J., strongly suggested that the impact analysis employed by the majority was not the proper means to assess the constitutionality of a state statute allegedly violating the Equal Protection Clause of the Fourteenth Amendment. Applying a rational basis test to the challenged statute, Judge Murray concluded that the veterans' preference law passed constitutional muster.

B. Actions Related to the Original Appeal.

On May 25, 1976, the Attorney General of the Commonwealth filed a notice of appeal from the partial final judgment invalidating Mass. Gen. Laws c. 31, § 23. An application for an extension of time to docket the appeal was filed with this Court on July 17, 1976, and allowed by order of Brennan, J., on July 20, 1976. The Appellants docketed their appeal on August 23, 1976. Subsequently, the nominal defendants advised the Clerk of this Court by letter that the appeal was not authorized by them and that it was taken over their objection. Their request that the Court dismiss the appeal was echoed in

³The remaining defendants are the Civil Service Commission and the Personnel Administrator, who supplanted the Director of Civil Service, n.2, *supra*.

a motion to dismiss or affirm filed by the Appellee and an *amicus curiae* brief in opposition to jurisdiction filed by the Commonwealth's Secretary of Administration and Finance "with the knowledge and approval of the Governor."

On November 8, 1976, this Court certified a single question to the highest court of the Commonwealth. In essence, the question posed was whether the Attorney General had the authority to prosecute an appeal to this Court over the expressed objection of the named state defendants against whom judgment was entered. On September 16, 1977, the Supreme Judicial Court answered the question in the affirmative, confirming the authority of the Attorney General to appeal this particular case.

Upon receipt of this answer, this Court summarily disposed of the appeal. In a *per curiam* order dated October 11, 1977, the Court vacated the judgment below and remanded the case for further consideration in light of *Washington v. Davis*, 426 U.S. 229 (1976).⁴

C. Subsequent District Court Proceedings and the Instant Appeal.

Just eight days after this Court's vacation of judgment and order of remand, the district court, acting *sua sponte*, ordered the parties to submit briefs addressing the issues raised by the remand. The Agreed Statement executed in 1975 was not updated and no further evidence was submitted by the parties.

On June 13, 1976, the district court, divided as it had been in its earlier opinion, found Mass. Gen. Laws c. 31, § 23, to be violative of the Equal Protection Clause of the Fourteenth Amendment. Except on matters related to discriminatory intent, the opinion relies heavily upon the original district

⁴Three justices (Powell, J., Brennan, J., and Marshall, J.) would have noted probable jurisdiction and set the case for oral argument (App. 245).

court opinion appearing at 415 F. Supp. 485 (App. 195-240).⁵ A timely notice of appeal was filed in the district court (App. 280-281), a timely jurisdictional statement was filed in this Court, and jurisdiction was duly noted. 47 U.S.L.W. 3239.

II. FACTS OF THIS CASE.

At the commencement of this action, the plaintiff, Helen B. Feeney, was a 53-year-old female residing in the Commonwealth of Massachusetts (App. 175). She is not a veteran and never applied⁶ for admission to any branch of the armed services of the United States (App. 83, 180).

Ms. Feeney entered the work force in 1948 and was employed almost continuously for 27 years thereafter. Prior to 1963 she worked exclusively in private industry and apparently never sought to enter state service (App. 176). In 1962 she passed a civil service examination and on April 24, 1963, she received an appointment to the State's Civil Defense Agency. She served continuously in that agency for approximately the next 12 years, and for approximately the last eight years of that period served as the agency's "Federal Funds and Personnel Coordinator" (App. 176-178). She became unemployed when

⁵The 1978 opinion contains the lower court's reasoning only on matters arising from reconsideration in light of *Washington v. Davis*, 426 U.S. 229 (1976). It is the earlier 1976 opinion discussed above in part IA which sets forth the district court's treatment of the other issues in the case. Viewed separately, each of the two opinions tells an incomplete story about the case; viewed together, they form an integrated whole. Conceptually, then, the two district court opinions must be treated as one.

⁶During World War II, Ms. Feeney did inquire as to enlistment programs for women, but was informed that parental consent was a precondition of enlistment by females. Her mother apparently declined to provide that permission on the ground that "the general reputation of the type of female who joined the military was not good" (App. 180).

the Commonwealth effectively eliminated the agency in March, 1975 (App. 176).

During the period from July 1, 1963, through June 30, 1973, the appointing authorities of the Commonwealth and its political subdivisions made 47,005 appointments to permanent positions in the Classified Official Service (App. 79). More than 68 per cent of those appointed were nonveterans. Forty-three per cent of those appointed were females and 57 per cent of them were males (App. 79). Fifty-four per cent or 14,476 of the males appointed were veterans (App. 79), while approximately 47 per cent of the males who composed the Massachusetts work force during the relevant period were veterans (App. 83). Fewer than 1 per cent of the women of working age in Massachusetts were veterans at the time (App. 83), and they obtained just under 2 per cent of the permanent positions awarded to female applicants (App. 79). A large, but unquantified, percentage of the female appointees during the 10-year period were in lower grade positions for which males traditionally did not apply (App. 79).

During the same 10-year period Ms. Feeney, whose suit was not filed as a class action, received a promotion to a position of importance within the Civil Defense Agency. She also passed four open competitive examinations for permanent positions in that period of time, but for one reason or another was not appointed to any of the positions she sought (App. 177-178). Ms. Feeney did not receive the highest score on those open competitive examinations.

In May of 1974, approximately one year after the period discussed above, Ms. Feeney also passed an open competitive examination for permanent positions classified as Administrative Assistant. Her score of 87 placed her in a five-way tie for seventeenth place on the relevant eligibility list (App. 77, 179). Application of the Massachusetts veterans' preference statute caused Ms. Feeney to be ranked seventieth among those eligi-

ble for appointment, but at the time the Agreed Statement of Facts was negotiated in this case, there were only requisitions from five appointing authorities for a total of seven administrative assistants. As a result of the temporary restraining order issued in this case on May 23, 1975, no permanent appointments have been made to those positions (App. 77, 179).

During the 10 years prior to the commencement of this action, literally thousands of eligible lists were prepared by those administering the Commonwealth's civil service system. Fifty of those lists were appended to the Agreed Statement (App. 80). On each of the 50 lists, female nonveterans who would have been certified as eligible for appointment, but for the application of veterans' preference, were ranked below veterans who received lower test scores. The lists do not purport to be representative of all such lists and no attempt was made to establish how many lists resemble those submitted (App. 80).

Based on the foregoing facts, Ms. Feeney challenges the Massachusetts civil service system which, like most other systems presently in effect in the United States, extends a hiring preference to wartime veterans. More specifically, she claims that application of the hiring preference statute discriminates against females seeking appointments to the Classified Official Service, one of two components of the Commonwealth's civil service system. Ms. Feeney points out that there were approximately 868,000 veterans residing in the Commonwealth when she commenced her action, of whom approximately 16,000 were females (App. 83), and she contends that the ineluctable effect of a ranking preference based on one's status as a veteran is the hiring of more males than females.

III. OPERATION OF THE MASSACHUSETTS CIVIL SERVICE SYSTEM.

Understanding Ms. Feeney's challenge also depends upon a comprehension of the way the Massachusetts civil service system operates. In Massachusetts, state law sets forth the requirements and procedures to be followed in filling certain positions, not only for the Commonwealth, but also its municipalities. *See generally*, Mass. Gen. Laws c. 31. At the time of Ms. Feeney's complaint only 60 per cent of the permanent positions at the state level were subject to civil service, while 40 per cent could be filled without reference to civil service requirements generally, or to veterans' preference in particular⁷ (App. 72). The positions subject to civil service themselves fall into two categories: the Classified Official Service and the Classified Labor Service (App. 72). The positions to which plaintiff sought appointment in this case and the statistics which provide the underpinnings of her case relate to the Classified Official Service.

An applicant for a permanent position in the Classified Official Service initially is required to pass a competitive examination, designed to separate qualified from unqualified applicants (App. 72-73). Thereafter, successful candidates are placed on eligible lists from which appointments are ultimately made. Under veterans' preference, it is only after a veteran has passed the competitive examination that (s)he receives a

⁷The range of positions not subject to civil service hiring systems includes many of the most desirable jobs in state government. Positions in the departments of the constitutional officers are excluded, as are legislative positions and other policy-making positions throughout state and local government. On occasion, Massachusetts lawmakers have excluded desirable positions from operation of civil service law specifically to expand the employment opportunities for women. *See, e.g.*, Mass. Gen. Laws c. 31, § 5, as amended by Mass. St. 1975, c. 134 (removing attorney's positions from the operation of the law).

preference, and that preference applies only to the order in which names are placed on the eligible list (App. 72).

Specifically, civil service law provides that qualified applicants be placed on the eligible list in the following order: (1) disabled veterans in order of their respective grades on the examination; (2) veterans in order of their respective grades on the examination; (3) widows of veterans and widowed mothers of veterans in order of their respective grades on the examination; (4) all other eligibles in order of their respective grades on the examination (App. 73).

When an appointing authority wishes to make a permanent civil service appointment it requisitions a certified eligible list for the specific position in question (App. 73). The Personnel Administrator then certifies candidates for appointment in accordance with the formula set forth in Civil Service Rule 14 (App. 74). In every instance that rule requires that more names are certified for appointment than there are vacancies. The appointing authority therefore has a measure of discretion in the actual hiring decision.⁸ The appointing authority is required to make the appointment from among the names so certified, but is not required to appoint the person highest on the list (App. 74-75).

Summary of Argument.

The Massachusetts veterans' preference statute is a facially neutral law which may have an incidental adverse impact on

⁸On January 9, 1978, Rule 14 was amended to provide greater flexibility in the certification of eligible candidates. Under the new Rule 14, the Personnel Administrator may certify a number of eligibles from a minority group regardless of ranking, equal to the number normally certified to fill a requisition, if it is determined that previous hiring practices discriminated against that minority group on the basis of race, color, sex or national origin.

the employment opportunities of women, but which serves legitimate state interests. Its legislative history and this Court's interpretation of the Equal Protection Clause both establish that the positional preference extended by virtue of Mass. Gen. Laws c. 31, § 23, to those who served in the armed forces during time of war is a legitimate exercise of legislative power.

Appellants' first argument places the veterans' preference law in historical and sociological context. Massachusetts was an early leader in the provision of benefits to those who sacrificed during periods of war and, like the federal government and most of the states, it now extends preferential treatment in civil service employment to its returning soldiers and sailors. The class of persons benefitting from the preference is composed largely of males, but the preference is extended to all persons, regardless of gender, who have performed wartime military service. The legislative history of the Massachusetts statute amply demonstrates that the preference was designed to serve the clearly legitimate goals of rewarding individuals for their prior service, easing their present transition to civilian life and encouraging future patriotic service by others.

The form of veterans' preference legislation varies greatly from one jurisdiction to another, perhaps reflecting the complexities of attempting to balance the concept of a preference with the administrative desire for a civil service work force of maximum efficiency and the desire not to be overly restrictive of employment opportunities for nonveterans, including women. Balancing these various interests is uniquely a function of the legislative branch of government, and the rough accommodation of those interests worked by the Massachusetts General Court is entitled to judicial deference.

In their second argument the Appellants demonstrate that, in the process of making value-laden judgments as to the opti-

mal form of veterans' preference, the district court applied an impact-based standard in contravention of the principles articulated in *Washington v. Davis*, 426 U.S. 229 (1976). *Davis* stands for the proposition that a facially neutral governmental act will not be invalidated solely because of disproportionate impact. On remand the district court reasoned that the impact of the Massachusetts statute rendered the veterans' preference statute facially nonneutral. After demonstrating the speciousness of that reasoning, the Appellants attack the conclusion of the lower court that the veterans' preference law is an instance of intentional gender-based discrimination. The court relied almost exclusively on an analysis of the perceived impact of the statute, and it consistently overstated the effect of veterans' preference on women as a group and Helen B. Feeney as an individual. Any disadvantage women as a group experience as a result of the operation of the law is readily explainable in terms of the statute's noninvidious purpose to benefit veterans.

Appellants' third and final argument addresses the inadequacies in the equal protection analysis embodied in the original district court opinion. If, as suggested in that opinion, the veterans' preference law was not enacted for the purpose of disqualifying women from civil service appointments, then the district court should only have applied a rational basis test in assessing the validity of the statute. If, on the other hand, the statute does purposefully discriminate against women, the court should have looked to determine whether the statute's classifications are substantially related to the achievement of important governmental objectives. The district court never indicated which standards it was applying, but it should not have engaged in the search for a least restrictive alternative, which inevitably led it to an incomplete and inaccurate comparison of state and federal law. Mass. Gen. Laws c. 31, § 23, establishes a preference which differs only

in degree from other veterans' preference statutes, and all of those statutes rationally further the achievement of important gender-neutral government objectives. The veterans' preference statute is therefore a constitutional exercise of legislative power.

Argument.

I. THE MASSACHUSETTS VETERANS' PREFERENCE STATUTE IS PART OF A COMPREHENSIVE LEGISLATIVE SYSTEM DESIGNED TO BENEFIT THOSE WHO SERVED IN THE MILITARY DURING TIME OF WAR AND THAT SYSTEM IS ENTITLED TO JUDICIAL DEFERENCE.

A. *The Massachusetts Veterans' Preference Statute is a Reflection of Time-Honored Policies of Benefitting Those who Serve their Country in Periods of War.*

1. The Concept of Veterans' Preference is Widely Accepted.

In his second inaugural address delivered just before the close of the Civil War, Abraham Lincoln spoke of the need "to care for him who shall have borne the battle and for his widow, and his orphan." Lincoln's expression of the nation's concern for those individuals who served their country in times of strife was nothing novel; the provision of some form of benefits to wartime veterans has long been a hallmark of civilized nations. As former Chief Justice Field of the Massachusetts Supreme Judicial Court once noted, "[f]rom the earliest times most nations have conferred honors and offices upon those who have rendered distinguished service to the

State, particularly in war." *Brown v. Russell*, 166 Mass. 14, 17, 43 N.E. 1005, 1006 (1896).

What is particularly noteworthy about President Lincoln's statement is that it was made at a time when the federal government was enacting the first veterans' hiring preference law in the nation's history.⁹ It also heralded the start of a 100-year period during which the number of federal civilian employees would be increased by 60 times. "Toward a Bureaucratic Society: Is Big Government Becoming Too Big?", 17 Public Administration News, No. 3, p. 2 (August, 1967). Since Lincoln's address, virtually every state in the country¹⁰

⁹The first enactment by Congress encouraging government employment of veterans was in the form of a resolution adopted March 3, 1865. Res. 27, 13 Stat. 571. It provided that persons honorably discharged from the military or naval service due to a disability incurred in the line of duty were to be preferred for appointment to "civil offices, provided they shall be found to possess the business capacity necessary for the proper discharge of the duties of such offices." *Id.*

¹⁰Appellants have attempted to catalogue the various state statutes in this note. For an earlier complete survey, see, State Veterans' Laws, Digests of State Laws Regarding Rights, Benefits and Privileges of Veterans and Their Dependents, House Committee on Veterans' Affairs, 91st Cong., 1st Sess. (1969).

Ala. Code § 36-26-15 (1975);
 Alaska Stat. § 39.25.150(23) (1975);
 Ariz. Rev. Stat. Ann. §§ 38-491, 38-492 (Cum. Supp. 1977-1978);
 Ark. Stat. Ann. § 12-2319 (1968);
 Cal. Const. Art. 7, § 6;
 Cal. Govt. Code § 18973 (West Cum. Supp. 1978);
 Col. Const. Art. 12, § 15;
 Conn. Gen. Stat. Ann. § 5-224 (West Cum. Supp. 1977);
 Del. Code Ann. Tit. 29, § 5935 (1974 & Cum. Supp. 1977);
 Fla. Stat. Ann. § 295.08 (West Cum. Supp. 1978);
 Ga. Const. Art. 3, § 7, par. 24;
 Ga. Code Ann. §§ 89-928 to 929 (1971);
 Hawaii Rev. Stat. § 76-103 (Supp. 1975);
 Idaho Code §§ 65-502 to 506 (1976 & Cum. Supp. 1977);
 Ill. Ann. Stat. c. 24, § 10-1-16 (Smith-Hurd Cum. Supp. 1978);

Ind. Code Ann. § 4-15-2-18 (Burns Cum. Supp. 1978);
 Iowa Code Ann. §§ 19A.9(21), 70.1, 400.10 (West 1978 & West 1978 & West Cum. Supp. 1978-1979);
 Kan. Stat. Ann. §§ 73-201, 75-2955 (1972);
 Ky. Rev. Stat. §§ 18.212, 67A.240, 90.320 (1971 & Cum. Supp. 1978);
 La. Const. Art. 10, § 10;
 La. Rev. Stat. Ann. § 33:2416 (West 1966);
 Me. Rev. Stat. Ann. Tit. 5, § 674 (1973 & Cum. Supp. 1978);
 Md. Ann. Code Art. 64A, § 18(c) (Cum. Supp. 1977);
 Mich. Comp. Laws Ann. §§ 35.401, 38.413 (Mich. Stat. Ann. §§ 4.1221, 5-1191(13) (Callaghan 1977, 1973));
 Minn. Stat. Ann. § 43.30 (West Cum. Supp. 1978);
 Miss. Code Ann. § 71-5-121 (1972);
 Mo. Const. Art. 4, § 19;
 Mo. Ann. Stat. § 36.220 (Vernon 1969);
 Mont. Rev. Codes Ann. § 77-501(3) (Cum. Supp. 1977);
 Neb. Rev. Stat. § 48-227 (1974);
 Nev. Rev. Stat. §§ 281.060, 284.260 (1975);
 N.H. Rev. Stat. Ann. § 283.4 (1977);
 N.J. Stat. Ann. §§ 11:27-4, 11:27-5 (West 1976);
 N.M. Stat. Ann. §§ 5-4-36.C, 74-5-1.B (Supp. 1975);
 N.Y. Const. Art. 5, § 6;
 N.Y. Civ. Serv. Law § 85 (McKinney 1973 & Cum. Supp. 1977-1978);
 N.C. Gen. Stat. § 128-15 (1974);
 N.D. Cent. Code § 37-19.1-02 (Supp. 1977);
 Ohio Rev. Code Ann. § 124.23 (Page 1978);
 Okla. Stat. Ann. Tit. 74, § 817 (West 1976);
 Or. Rev. Stat. § 408.230 (1977);
 Pa. Cons. Stat. Ann. §§ 7103, 7104 (Purdon 1976);
 R.I. Gen. Laws § 36-4-19 (1969);
 S.D. Comp. Laws Ann. § 3-3-1 (1974);
 Ten. Code Ann. § 8-3206 (1973);
 Tex. Rev. Civ. Stat. Ann. Art. 4413(31) (Vernon 1976);
 Utah Code Ann. § 34-30-11 (Supp. 1977);
 Vt. Stat. Ann. Tit. 20, § 1543 (1968);
 Va. Code § 2.1-112 (1973);
 Wash. Rev. Code Ann. §§ 41.04.010, 73.16.010 (Supp. 1977);
 W. Va. Code §§ 6-13-1, 29-6-10 (Cum. Supp. 1978);
 Wyo. Stat. §§ 19-119, 19-121 (Cum. Supp. 1975).

and several foreign jurisdictions¹¹ have followed the lead of the United States and enacted some form of veterans' preference hiring law.

The form of these statutes varies widely. At the time of the original district court opinion, 41 states and the federal government utilized a point preference system whereby a varying number of points were added to a veteran's examination score before the veteran was ranked against the pool of applicants.¹² Of these 41 states, eight and the federal government augmented the point preference by granting a positional preference for certain job categories or for disabled veterans.¹³

¹¹In 1944 the Senate Committee on Civil Service identified at least nine foreign countries which then extended hiring preferences to veterans: Austria, Belgium, Canada, England, France, Germany, Italy, Poland and Yugoslavia. Hearings on Preference in Employment of Honorably Discharged Veterans Where Federal Funds are Disbursed before the Senate Committee on Civil Service, 78th Cong., 2d Sess. (1944). But one recent commentator suggests that veterans' preference lacks currency in other nations. Blumberg, "De Facto and De Jure Sex Discrimination Under the Equal Protection Clause: A Reconsideration of the Veterans' Preference in Public Employment" 26 Buffalo L. Rev. 1, 9 n.41 (1976-1977).

¹²Alaska; Arizona; Arkansas; California; Colorado; Connecticut; Delaware; Florida; Georgia; Idaho; Illinois; Indiana; Kansas; Kentucky; Louisiana; Maine; Maryland; Michigan; Minnesota; Mississippi; Missouri; Montana; Nebraska; Nevada; New Mexico; New York; North Carolina; North Dakota; Ohio; Oklahoma; Oregon; Rhode Island; South Carolina; Tennessee; Texas; Virginia; Washington; West Virginia; Wisconsin; Wyoming.

¹³See, 5 U.S.C. § 3313(2)(a) (1970) (10 per cent or more disability); Cal. Govt. Code § 18971 (policemen and watchmen), § 18972 (specific services as designated) (West 1963); Ga. Code § 78-412 (1975) (positions in the Department of Veterans Service); Idaho Code § 65-506 (1976) (disabled veterans); Ind. Code § 19-35-3 (1971) (firemen); Mont. Rev. Codes Ann. § 77-501(2) (1966) (disabled veterans for jobs not requiring examinations); Neb. Rev. Stat. § 48-226 (1974) (jobs outside merit system); N.H. Rev. Stat. Ann. §§ 283:4, 283:6 (1966 & Supp. 1975) (public works jobs); N.D. Cent. Code § 37-19.1-02-4(f)(1) (Supp. 1975) (disabled veterans); R.I. Gen. Laws § 30-21-8 (disabled veterans), § 30-21-9 (custodial service) (1968).

Four of the 41 states gave preferences to veterans only if they scored equally with nonveterans on civil service examinations,¹⁴ while some states gave tie-breaking preferences to veterans in addition to point preferences.¹⁵ An additional seven states, plus Massachusetts, extended a positional preference to all veterans passing a civil service examination, where veterans' preference was applicable.¹⁶ Almost all of these states extend veterans' preference to all available civil service jobs.¹⁷

These various statutes share a common purpose and a common historical background. Each was designed to reward, rehabilitate and reintegrate those who served the country during time of war. Given the fact that 98 per cent of the veterans in the country are men, each statute predictably benefits a class comprised largely of males at the comparative expense of a class including large numbers of females.

2. The History of Veterans' Preference in Massachusetts Displays a Noninvidious Desire to Benefit All Persons who Served the United States in Times of War.

While both state and federal legislatures have long since committed themselves to compensating the wartime sacrifices of veterans, historically Massachusetts was a leader in these ef-

¹⁴Colorado; Iowa; Nevada; Texas.

¹⁵See, e.g., Alaska; Kansas; Louisiana.

¹⁶New Jersey; Pennsylvania; South Dakota; Utah; Vermont; Washington.

¹⁷Alabama; Alaska; Arizona; Arkansas; California; Colorado; Connecticut; Delaware; Georgia; Indiana; Kansas; Louisiana; Maine; Maryland; Michigan; Minnesota; Mississippi; Missouri; Montana; Nevada; New Jersey; North Carolina; Oklahoma; Oregon; Pennsylvania; South Carolina; Tennessee; Utah; Vermont; Virginia; Washington; West Virginia; Wisconsin; Wyoming.

forts and retains that position today.¹⁸ The very first veterans' benefit enacted in America was a pension for disabled soldiers provided by the Plymouth Colony in 1636. Laws of the Colony of New Plymouth (1636), *reprinted in* The Compact with the Charter and Laws of the Colony at 44 (1836). In succeeding years the provision of veterans' benefits mirrored the military experiences and evolving government structure of the Massachusetts Bay Colony. In 1744, during the War of Austrian Succession (King George's War), the Colony passed an act providing public funds for the support of those disabled during that war. Act of May 13, 1744, c. 2, § 14 [1744-1745] Acts and Resolves of the Province of Massachusetts Bay 1st Sess. 146.

Similarly, 1778 saw the passage of legislation designed to supply the necessities of life to families of soldiers participating in the Revolution. Act of February 8, 1778, c. 20, § 2 [1777-1778] Acts and Resolves of the Province of Massachusetts Bay 5th Sess. 775. These early efforts by Massachusetts lawmakers demonstrate the colonists' commitment to providing post-war support for those disabled during battle.

With the increase in public employment during the later part of the nineteenth century, the concept of a civil service hiring preference emerged. After the federal government enacted the first hiring preference at the end of the Civil War, a number of states followed suit. In 1884 Massachusetts

¹⁸ The preference extended to veterans in placement on civil service eligible lists is one part of an extensive scheme of state aid to veterans. Those benefits include, for example, exemptions from certain license fees, Mass. Gen. Laws c. 101, § 24; c. 175, § 167A; exemption from motor vehicle registration fees, Mass. Gen. Laws c. 90, § 33; preferences for low rent and state-aided housing projects, Mass. Gen. Laws c. 121B, §§ 27, 32(f) and 34; exemption from tuition for certain courses at state colleges and universities, Mass. Gen. Laws c. 73, § 8A; c. 69, §§ 7 and 7A; retirement benefits, Mass. Gen. Laws c. 32, §§ 25(3), 56-58B; and a one-of-a-kind subsistence program, Mass. Gen. Laws c. 115, § 5.

enacted a statute designed to improve the state's public employment system which included a veterans' preference. Mass. Acts and Resolves (1884) c. 320, § 14(6).

Since these early efforts, almost all state legislatures have adopted veterans' preference.¹⁹ These states and Congress have continuously reconsidered and refined the structure of the preferences. The federal legislative history is replete with amendments and revisions regarding the exact operation of the system and the degree of preference to be given. *See generally* U.S. Civil Service Commission, *History of Veterans' Preference in Federal Employment 1869-1955* (1956), and 5 U.S.C. §§ 2108, 3309-3312, 3316 (1970). The various amendments reflect the complexities of the legislative policies behind veterans' preference and evidence the need to balance the concern for efficient government, the unique employment problems of wartime veterans and the competing employment interests of other identifiable groups. The Massachusetts experience is illustrative of the balancing process.

One decade after the enactment of c. 320 of the Acts of 1884, the General Court amended the statute by striking a requirement that "other qualifications must be equal" in order that the preference be given. Mass. Acts and Resolves (1895) c. 501. After setting forth the mechanics of the preference, the act specifically provided: "But nothing herein contained shall be construed to prevent the certification and employment of women." *Id.* at § 1. It further stated:

Veterans who have made application for employment in the public service in accordance with [the civil service rules] shall be preferred for certification and appointment in preference to all other applicants not veterans, *except women*. . . . *Id.* at § 2 (emphasis supplied).

¹⁹ *See* n.10, *supra*.

As far as the Commonwealth has been able to ascertain, these provisions mark the earliest efforts in the nation to reconcile the desire to improve employment opportunities for women with the impact of veterans' preference.

One year later, the veterans' preference section was rewritten, Mass. Acts and Resolves (1896) c. 517, reinserting the requirement that veterans pass a qualifying examination prior to being granted a preference.²⁰ By requiring a passing grade, the legislature assured that veteran applicants would be competent for state service, while maintaining the substance of the benefit. The provisions pertaining to the certification or employment of women quoted above were retained. *Id.*

Throughout the twentieth century virtually all major revisions of the Massachusetts veterans' preference occurred following periods of war. For example, in 1922 as a direct response to the special needs of disabled World War I veterans, a special preference category was created for disabled veterans so that, if qualified, they would be employed prior to all others. Mass. Acts and Resolves (1922) c. 463. Further revisions occurred after World War II, Mass. St. 1949, c. 642, § 1; the Korean Conflict, Mass. St. 1954, c. 627; and during the Vietnam Conflict, Mass. St. 1965, c. 875; Mass. St. 1968, c. 531, § 1.

The Massachusetts history also convincingly demonstrates that women with wartime service have always received veterans' benefits, including preferential civil service employment rights, on an equal footing with their male counterparts. On August 12, 1918, 10,000 women were admitted to the

²⁰"The distinguishing and saving difference of the new law is that every appointee, be he veteran or not, must pass his examination; he must exceed that minimum which the Civil Service Rules fix as a sufficient test of knowledge." "Preference of Veterans in the Massachusetts Civil Service," 10 Harv. L. Rev. 236 (1896).

Navy and Marine Corps and served respectively as "Yeomanettes" and "Marinettes." Those women received veterans' preference. Mass. Acts and Resolves (1919), c. 150; 5 *Op. Atty. Gen.* 500 (Mass. 1920). The 1943 revision of the veterans' preference law contained a specific provision extending that benefit to women who were serving in the newly created Women's Army Auxiliary Corps (WAACS) or the Women Accepted for Volunteer Emergency Services (WAVES). Mass. St. 1943, c. 194.

Again, after the Korean war, the Massachusetts statutes were revised in a manner which removed any doubt that women with wartime military service are entitled to equality of preference. This time, rather than merely amend the civil service laws, the legislature amended the provisions of Massachusetts law pertaining to uniformity of definitions of statutory words by providing a specific, gender-neutral definition of the word "veteran". Mass. St. 1954, c. 627, § 1. Mass. Gen. Laws c. 4, § 7 (43), still defines a veteran in such sex-neutral terms. A "veteran" is:

any person, male or female, including a nurse, (a) whose last discharge or release from his wartime²¹ service, as defined herein, was under honorable conditions and who (b) served in the army, navy, marine corps, coast guard, or air force of the United States for not less than ninety days active service, at least one day of which was for wartime service, provided, that any person who so served in wartime and was awarded a service-connected disability or a Purple Heart, or who died in such service under conditions other than dishonorable, shall be deemed to be a

²¹"Wartime service" is itself defined to mean service performed by a "Spanish War veteran," a "World War I veteran," a "World War II veteran," a "Korean veteran," a "Vietnam veteran," or "a member of the WAAC." *Id.* (App. 222-224).

veteran notwithstanding his failure to complete ninety days of active service. (Emphasis supplied.) (App. 222-224.)

The 1954 amendments substantially revised the veterans' preference statute and, apart from special reformatory amendments,²² the present system is virtually identical to that created by those revisions. Its operation is summarized in the Statement of the Case at pp. 11-12, *supra*.

3. The Goals of Veterans' Preference are Legitimate.

The present Massachusetts veterans' preference statute, like its historic antecedents and its counterparts in other jurisdictions, is designed to serve well-recognized significant purposes: (1) to reward those who have sacrificed in the service of their country; (2) to assist veterans in their readjustment to civilian life; and (3) to encourage patriotic service. The legitimacy of these legislative goals is beyond cavil. The Massachusetts Supreme Judicial Court has repeatedly spoken of the compelling nature of those interests in such cases as *Hutcheson v. Director of Civil Service*, 361 Mass. 480, 281 N.E. 2d 53

²²With the exception of the amendments described in note 1, *supra*, there have been only two substantive amendments to § 23 since 1954. The first, Mass. St. 1971, c. 219, deleted the underscored portions of the following language: "Upon receipt of a requisition *not especially calling for women*, names shall be certified from such lists according to the method of certification prescribed by the civil service rules *applying to civilians*." This change eliminated language referring to special requisition lists classified along lines of gender which were no longer in use and eliminated the last vestiges of disparate treatment of similarly situated males and females in the civil service system. The second amendment removed the absolute preference for disabled veterans in appointment but added an absolute preference in retention. Mass. St. 1971, c. 1051, § 1. The amendment had no effect on disabled veterans' preferred placement on the eligible list.

(1972); *Opinion of the Justices*, 190 Mass. 611, 77 N.E. 820 (1906); and *Brown v. Russell*, 166 Mass. 14, 43 N.E. 1005 (1896). Furthermore, courts from other jurisdictions which have considered the problem have universally acknowledged and approved the basic purposes served by the many different veterans' preference statutes.²³ In fact, this Court itself has spoken approvingly of the purposes underlying veterans' preference legislation in *Johnson v. Robison*, 415 U.S. 361 (1974), and *Mitchell v. Cohen*, 333 U.S. 411 (1948). Even the district court in the case at bar, while holding the Massachusetts statute to be unconstitutional, concedes the underlying validity of these goals. *Anthony v. Massachusetts*, 415 F. Supp. 485, 496-497 (D. Mass. 1976) (App. 213-215).

The statute's history, its purposes and its operation demonstrate that the provisions of veterans' preference is part of a general nationwide effort to reward, rehabilitate and reintegrate veterans who have served their country in time of war. The evolution of the Massachusetts statute and the variations with respect to veterans' preference enacted by the

²³*Rios v. Dillman*, 499 F. 2d 329 (5th Cir. 1974); *White v. Gates*, 253 F. 2d 868 (D.C. Cir.), *cert. denied*, 356 U.S. 973 (1958); *Russell v. Hodges*, 470 F. 2d 212 (2d Cir. 1972); *Branch v. DuBois*, 418 F. Supp. 1128 (N.D. Ill. 1976); *Feinerman v. Jones*, 356 F. Supp. 252 (M.D. Pa. 1973); *Koelfgen v. Jackson*, 355 F. Supp. 243 (D. Minn. 1972), *aff'd mem.* 410 U.S. 976 (1973); *Ballou v. State Department of Civil Service*, 148 N.J. Super. 112, 372 A. 2d 333 (1977); *Commonwealth ex rel. Graham v. Schmid*, 333 Pa. 568, 3 A. 2d 701 (1938); *State ex rel. Kangas v. McDonald*, 188 Minn. 157, 246 N.W. 900 (1933); *People ex. rel. Sellers v. Brady*, 262 Ill. 578, 105 N.E. 1 (1914); *Goodrich v. Mitchell*, 68 Kan. 765, 75 Pac. 1034 (1904). The language of *Rios* is typical. There the court noted that the objectives of veterans' preference included: encouraging citizens to serve their country in time of war, rewarding those who do serve and aiding in the rehabilitation and location of a veteran whose normal lifestyle has been disrupted by military service. *Rios v. Dillman*, *supra* at 332. It is noteworthy that the litany of purpose varies little from one case to another and that the validity of these goals is assumed rather than deduced. Apparently the worthiness of the purposes has never seriously been disputed.

several states and by Congress serve to underscore the fact that there is still no agreement as to the optimal form of a veterans' preference law. Accordingly, in the absence of a clear constitutional violation, judgments as to the form of a particular veterans' preference law should continue to be made by each jurisdiction based on an assessment of its own particular needs and resources.

B. The Desirability of Veterans' Preference is a Complex Question Demanding Legislative Rather than Judicial Resolution.

In recent years veterans' preference has been increasingly subject to criticism and attack. Some suggest that there is less concern for the welfare of returning Vietnam war veterans, who are perceived as having "lost" an unpopular war. See, e.g., P. Starr, *The Discarded Army: Veterans After Vietnam* (1973). In some instances the source of the opposition comes from women's groups, who see veterans' preference as an obstacle in their quest to obtain meaningful governmental employment opportunities for females.²⁴ At other times the desire to cut back on preference for veterans may be traced to the desire of government managers to increase the flexibility and competence of their work force.²⁵ Whatever the reasons or the sources for the criticism, Appellants suggest that the legislative branch of government is the only appropriate forum to weigh the competing social values affected by veterans' preference to meet the particular needs of the time.

²⁴ See, e.g., League of Women Voters of Massachusetts, *The Merit System in Massachusetts* (1961).

²⁵ President's Special Message to Congress on Civil Service Reform, 124 Cong. Rec. H. 1661 (daily ed. March 2, 1978), reprinted in [1978] U.S. Code Cong. & Adm. News 561, 565.

There are many diverse and oftentimes conflicting factors which must play a role in any decision as to the form of a veterans' preference statute. First and foremost among them is the unique employment problems which face veterans returning from the extraordinary disruption in their lives caused by wartime military service. The "special problems of veterans" alluded to in the original lower court opinion are not an illusion. *Anthony v. Massachusetts*, 415 F. Supp. 485, 497 (D. Mass. 1976) (App. 215). In every year since 1971 the national unemployment rate for younger veterans has significantly exceeded the unemployment rates for comparably aged nonveterans in general and nonveteran females in particular. These problems do not appear to have abated with the passage of time; the unemployment rate for younger veterans hovered around the 20 per cent level during the three calendar years between 1974 and 1976, and the level for minority veterans during the same period consistently approximated around 30 per cent. U.S. Department of Labor, Employment and Training Administration, Employment and Training Report of the President (Tables A-8, A-19) (1977). During that period the Commonwealth of Massachusetts was ranked twenty-seventh in placing Vietnam-era veterans in jobs. S. Rep. No. 94-1293, 94th Cong., 2d Sess. (1976). In a slightly earlier period the Commonwealth was ranked twenty-eighth in the placement of veterans of all ages. Hearings on Veterans' Unemployment Problems, S. 760 and Related Bills before the Subcommittee on Readjustment, Education and Employment of the Senate Committee on Veterans' Affairs (Graph at 150-152), 94th Cong., 1st Sess. (1975). One can only speculate what the employment picture would have been for veterans had there not been a civil service preference in effect during that period.

The problems of readjustment which contributed to high nationwide unemployment rates for veterans have been ex-

acerbated in Massachusetts by a constrictive regional economy. The period just prior to the original district court opinion is illustrative of the point. In the first quarter of 1975, nationwide unemployment figures reached 8.3 per cent. U.S. Department of Labor, Bureau of Labor Statistics, Labor Force Developments: First Quarter, Table 1 (1975). In the New England states unemployment in May 1975 was 11.4 per cent, well above the national average, and in Massachusetts the May 1975 unemployment rate was 12.6 per cent. U.S. Department of Labor, Bureau of Labor Statistics, News, 2 (July 3, 1975). Thus, employment opportunities for veterans who had been away from the civilian work force for a period of years were minimal at best.

To be sure, employment opportunities for women and others were also restricted, but it is uniquely a legislative function to establish hiring priorities and to promote alternative methods of ensuring job opportunities for females. It appears that Massachusetts was pursuing those alternatives in the period directly preceding commencement of this action. It was in 1975, for instance, that various governmental lawyer's positions were removed from the operation of civil service law to enhance the likelihood of women being hired. Mass. St. 1975, c. 134. It was also in 1975 that the General Court took the final legislative action necessary to place the so-called "Equal Rights Amendment" before the Massachusetts electorate, and it was in the same year that the state adopted an affirmative action program for the state work force designed to assure that women obtain a proportional share of state jobs at all levels. Mass. Exec. Order 116 (1975).

The Appellants submit that the Massachusetts General Court alone had the institutional competence to reconcile all these competing interests and to take the steps necessary to address employment problems generally. The state legislature had the requisite knowledge of the staffing needs of the gov-

ernment bodies drawing their employees from the civil service system. It had the intimate awareness of the state's resources, economic conditions and human needs so necessary to a judgment on veterans' preference. As Justice Powell once observed, in an analogous situation, federal courts should be "unwilling to assume for [themselves] a level of wisdom superior to that of legislators" when, as here, the legislative scheme "has constituted a 'rough accommodation' of interests in an effort to arrive at practical and workable solutions. . . ." *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 55 (1973). See also, *City of New Orleans v. Dukes*, 427 U.S. 297 (1976), and *Ferguson v. Skrupa*, 372 U.S. 726 (1963).

In this case principles of federalism and separation of powers should have dictated a degree of deference to a legislative determination which concededly serves legitimate governmental interests and was not "enacted for the purpose of disqualifying women from receiving civil service appointments." *Anthony v. Massachusetts*, 415 F. Supp. 485, 495 (D. Mass. 1976) (App. 212). However, the methodology of the district court was anything but deferential. On the contrary, the district court consistently stretched constitutional doctrine and made value-laden judgments as to the wisdom of the Massachusetts veterans' preference statute.

II. THE DISTRICT COURT DECISION ON REMAND CONFLICTS WITH THIS COURT'S OPINION IN *WASHINGTON V. DAVIS*.

A. *The Lower Court Did Not Adequately Reconsider the Results of its Original Opinion.*

The clearest illustration of the result-oriented nature of the district court's treatment of the Massachusetts veterans' preference statute emerges from a comparison of the two district court opinions in this case. The first opinion was rendered in March of 1976, at a time when many lower courts apparently subscribed to the theory that proof of a disproportionate impact was sufficient to establish a violation of the Equal Protection Clause. See, *Washington v. Davis*, 426 U.S. 229, 244-245 n.12 (1976), and cases cited therein. In its original opinion, the court found that "[f]acially, the [Massachusetts] Veterans' Preference is open to both men and women" and that it "was not enacted for the purpose of disqualifying women from receiving civil service appointments." *Anthony v. Massachusetts*, 415 F. Supp. 485, 498, 495 (D. Mass. 1976) (App. 219, 212). Nevertheless, the district court concluded that Mass. Gen. Laws c. 31, § 23, violated the Equal Protection Clause of the Fourteenth Amendment, primarily because it purportedly had a devastating impact on employment opportunities for women.

Shortly after that decision was issued, this Court rendered its decision in *Washington v. Davis*, 426 U.S. 229 (1976). That case firmly established the principle that a law or other state action which is neutral on its face does not violate the constitution solely because it has a disproportionate impact on a discrete and insular minority. On the contrary, this Court ruled that while impact alone might suffice in a statutory claim brought under Title VII of the Civil Rights Act of

1964,²⁶ proof of a discriminatory purpose is a necessary precondition of a successful equal protection challenge of a facially neutral state action.

Given the apparent inconsistencies between the statements contained in the original district court opinion and the standards articulated in *Davis, supra*, this Court followed its "usual practice in [such] situation[s]" by vacating the judgment below and "remanding in order to permit the lower court to reconsider its ruling" in light of the Supreme Court's intervening and superceding decision. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 272 (1977) (White, J., dissenting). See also, *Bell v. Maryland*, 378 U.S. 226 (1964).

On remand, the district court simply reversed its earlier inconsistent statements pertaining to facial neutrality and the statute's purposes. Where once the court had spoken of the fact that veterans' preference was open to both men and women, on remand the district court noted that Mass. Gen. Laws c. 31, § 23, "is not facially neutral." *Feeney v. Massachusetts*, 451 F. Supp. 143, 147 n.7 (D. Mass. 1978) (App. 260). Whereas the court had once offered the observation that the veterans' preference law was not enacted for the purpose of denying civil service appointments to females, *Anthony v. Massachusetts*, 415 F. Supp. 485, 495 (D. Mass. 1976) (App. 212), now it opined that the intent of the Commonwealth in passing Mass. Gen. Laws c. 31, § 23, was to benefit veterans

²⁶ The challenge to the Massachusetts veterans' preference statute is exclusively a constitutional, as opposed to a Title VII, challenge. In fact, the Massachusetts statute is immune from a Title VII attack by virtue of 42 U.S.C. § 2000e-11, which provides, in part:

Nothing contained in this subchapter shall be construed to repeal or modify any Federal, State, territorial, or local law creating special rights or preference for veterans.

"by subordinating employment opportunities of its women."²⁷ *Feeney v. Massachusetts*, 451 F. Supp. 143, 149-150 (D. Mass. 1978) (App. 264).

These dramatic and contradictory shifts in the language of the district court opinions defy logic and can only be attributed to a socially motivated desire to preserve the earlier invalidation of Mass. Gen. Laws c. 31, § 23. This is particularly true in light of the fact that there was no new evidence adduced during the proceedings on remand. It therefore appears that the district court did not reconsider the result of its earlier opinion as much as it considered how to rewrite the opinion to preserve the result. Both the conclusion that the veterans' preference law is not facially neutral and the finding of intentional gender-based discrimination are based on the application of incorrect standards of law.

B. The District Court Erred in Concluding that the Veterans' Preference Statute is Not Facially Neutral.

The starting point for the district court's analysis on remand was the assertion that "[t]he factual underpinning in this case is entirely different" from that in *Washington v. Davis*, 426 U.S. 229 (1976), *Feeney v. Massachusetts*, 451 F. Supp. 143, 147 (D. Mass. 1978) (App. 259), since the veterans' preference statute was perceived to be "anything but an impartial, neutral policy" of selecting civil service applicants for certification and appointment. *Feeney v. Massachusetts*, 451 F. Supp. 143, 147 n.7 (D. Mass. 1978) (App. 259). Facial neutrality is particularly significant because it triggers the search for intentional discrimination required by *Davis*.

²⁷ The concurring justice, Campbell, J., had a dissimilar view as to the issue of discriminatory intent, noting that "[t]he statute can likewise be said not to be based on a discriminatory intent, in the sense that no one thinks that it was enacted as a pretext to harm women." 451 F. Supp. at 150 n.* (App. 266).

Even a cursory reading of the challenged statute reveals that in all relevant aspects²⁸ the law is facially neutral in terms of gender. Mass. Gen. Laws c. 31, § 23, bestows employment preferences on veterans at the expense of nonveterans, but it draws no line based on the sex of civil service applicants. Any argument that the word "veteran" is sex-specific is negated by the definition of the phrase appearing in Mass. Gen. Laws c. 4, § 7(43). It includes "any person, male or female" who otherwise meets the criteria set forth in the statute (App. 222).²⁹ Thus, as the lower court previously acknowledged, "[f]acially, the Veterans' Preference is open to both men and women." *Anthony v. Massachusetts*, 415 F. Supp. 485, 498 (D. Mass. 1976) (App. 219).

In attempting to distinguish this case from *Davis* (App. 258), the district court apparently confused the analysis of the veterans' preference statute on its face with the analysis of its effects and its background. Recent decisions of this Court amply illustrate that, in assessing facial neutrality, lower courts must confine their inquiry to whether the statute draws lines based on gender as such. *Geduldig v. Aiello*, 417 U.S. 484 (1974); *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976); *City of Los Angeles, Department of Water and Power v. Manhart*, 435 U.S. 702 (1978). The Court's treatment of pregnancy, which unlike veterans' status is clearly a gender-linked condition unique to women, is particularly noteworthy:

²⁸ At the time of the initiation of this action, preferences were also extended to "widows" and "widowed mothers" of veterans. Mass. Gen. Laws c. 31, §§ 23B, 24. These preferences were obviously gender-specific, but they did not operate to the detriment of Helen Feeney or of women as a class. These provisions have since been made gender-neutral, by making the preference applicable to "surviving spouses" and "surviving parents." Mass. St. 1977, c. 815.

²⁹ The definition is set forth in full at pp. 23-24, *supra*.

The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition — pregnancy — from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in [*Reed v. Reed*, 404 U.S. 71 (1971)] and [*Frontiero v. Richardson*, 411 U.S. 677 (1973)]. Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.

The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups — pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes. *Geduldig v. Aiello*, *supra*, at 496-497 n.20.

The status of veterans, like the condition of pregnancy, is objectively identifiable. Unlike pregnancy, however, it is not unique to persons of one sex. While the California program considered in *Geduldig* divided recipients into two groups, one

of which was comprised exclusively of females, the Massachusetts preference creates two classes, both of which include significant numbers of men and women. Under the standards articulated in *Geduldig*, therefore, one can hardly assert that Mass. Gen. Laws c. 31, § 23, is anything but facially neutral. In fact, each court which has recently assessed the constitutionality of veterans' preference legislation has recognized those laws to be gender-neutral. *Bannerman v. Department of Youth Authority*, 436 F. Supp. 1273 (N.D. Cal. 1977); *Branch v. DuBois*, 418 F. Supp. 1128 (N.D. Ill. 1976); *Ballou v. State Department of Civil Service*, 148 N.J. Super. 112, 372 A. 2d 333 (1977).

Apparently the district court found that the Massachusetts statute was not facially neutral because of its relationship to overly restrictive federal statutes and military regulations which, according to the district court, served to limit the opportunities for women to serve in the military in time of war. The lower court's conclusion that the facial neutrality of the Massachusetts statute must be analyzed against a backdrop of federally-imposed, gender-based restrictions on the composition of the armed forces is fallacious for a number of reasons. First, of course, is the fact that the Commonwealth cannot be held legally responsible for the effects of federal military policy. Cf. *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 93, 94 n.6 (1973) (employer not responsible for onerous naturalization policies imposed by Congress); *N.A.A.C.P. v. Lansing Board of Education*, 559 F. 2d 1042, 1049 (6th Cir. 1977) (school officials not responsible for segregative housing patterns).

Second, the allegedly restrictive federal regulations did not adversely affect the single plaintiff in this case or the class of women as whole. Helen B. Feeney, like so many of her contemporaries, never sought to enter the armed forces of the

United States (App. 83). Apparently the reasons for the lack of women in the military were social in nature and have nothing to do with arbitrarily set quotas based on stereotypical views of the role of females in the military (App. 180). The fact is that quotas have never served as an actual cap on female participation during times of war, because the quotas have never been met. Office of the Assistant Secretary of Defense, Manpower, Reserve Affairs, and Logistics: Use of Women in the Military, Background Study, May, 1977; M. Binkin & S. Bach, *Women and the Military*, 10, 11 (1977). For whatever reason, significant numbers of women have simply never volunteered for wartime service.

The documented reluctance of females to join the military in wartime is illustrative of the third point; if there is gender-based discrimination inherent in federal regulations, it is discrimination against males. Wartime service, especially service in actual combat, is not a benefit bestowed on males in violation of the concept of equal protection. It is instead an obligation imposed on males who are subject to conscription under the Selective Service Act.³⁰ When males mounted direct sex discrimination challenges to the draft during the Vietnam war and its aftermath, the federal judiciary virtually uniformly rejected those challenges. See, e.g., *United States v. Reiser*, 394 F. Supp. 1060 (D. Mont. 1975), *rev'd*, 532 F. 2d 673 (9th Cir. 1976); *United States v. St. Clair*, 291 F. Supp. 122 (S.D. N.Y. 1968); *Suskin v. Nixon*, 304 F. Supp. 71 (N.D. Ill. 1969); *United States v. Cook*, 311 F. Supp. 618 (W.D. Pa. 1970);

³⁰ In fiscal 1970 draftees represented 70 per cent of all combat soldiers, and 43 per cent of all combat fatalities. P. Starr, *The Discarded Army: Veterans After Vietnam*, p. 10 (1973). The Army in particular came to rely heavily on draftees. In 1969, 62 per cent of all Army combat deaths were draftees. Hearings on the Extension of the Draft and Bills Related to the Voluntary Force Concept and Authorization of Strength Levels before the House Committee on Armed Services, 92d Cong., 1st Sess. (1971), p. 172.

United States v. Dorris, 319 F. Supp. 1306 (W.D. Pa. 1970). Now, however, the district court indirectly suggests that the same statutes are sufficiently violative of the Equal Protection Clause to taint the Massachusetts veterans' preference law and render it "not facially neutral." *Feeney v. Massachusetts*, 451 F. Supp. 143, 147 n.7 (D. Mass. 1978) (App. 259-260 n.7).

The significance of the district court's error in holding that Mass. Gen. Laws c. 31, § 23, is not facially neutral cannot be overstated, because that error infects the balance of the court's opinion. The majority opinion clearly indicates that the standards to be used in assessing neutral and nonneutral statutes differ markedly. Specifically, the court concedes that "foreseeability of impact" would not be an adequate standard in cases involving facially neutral statutes. *Feeney v. Massachusetts*, 451 F. Supp. 143, 147 n.7 (D. Mass. 1978) (App. 259-260 n.7). Since foreseeability is one of the keys to the lower court finding on intentional discrimination in this case, see Part IIC, *infra*, the question of the facial neutrality of the statute may well be outcome-determinative.

Concededly, the benefits extended by Mass. Gen. Laws c. 31, § 23, are bestowed on a class composed largely of males, but it is a class which technically and in fact is open to persons of both sexes. Furthermore, the fact that the application of the statute results in benefits to more persons of one sex than the other can never obviate its facial neutrality. In *Davis*, *supra*, this Court held that disproportionate impact alone will not invalidate a facially-neutral statute. It is pure sophistry to argue that a statute is not facially neutral, and that *Davis* does not apply, because of its impact. This Court should not allow such circular reasoning to avoid the holding in *Davis*.

C. *The District Court Improperly Concluded that the Veterans' Preference Statute is an Instance of Intentional Gender-Based Discrimination.*

It is by now axiomatic that a facially neutral governmental act will not be held violative of the Equal Protection Clause in the absence of a showing of purposeful discrimination. *Washington v. Davis*, 426 U.S. 229 (1976); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977).

By stating that only intentional discrimination against minority groups violates the Constitution, this Court has shifted the focus in constitutional litigation from an assessment of discriminatory effect to a probing inquiry into motives. Disproportionate impact is not irrelevant to the inquiry, "but it is not the sole touchstone of an invidious . . . discrimination forbidden by the Constitution." *Davis*, 426 U.S. at 242.³¹ Rather, courts must conduct "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights*, 429 U.S. at 266.

In *Arlington Heights*, this Court enunciated a nonexhaustive list of circumstantial and direct evidentiary factors which are "subjects of proper inquiry in determining whether . . . discriminatory intent existed." *Arlington Heights*, 429 U.S. at 268.³² By enunciating and applying those evidentiary factors,

³¹ In *Arlington Heights*, this Court did note that, in "rare" cases, discriminatory impact alone can be determinative. But, "[a]bsent a pattern as stark as that in *Gomillion* [v. *Lightfoot*, 364 U.S. 339 (1960)] or *Yick Wo* [v. *Hopkins*, 118 U.S. 356 (1886)], impact alone is not determinative, and the Court must look to other evidence." *Arlington Heights*, 429 U.S. at 266. See also *Castaneda v. Partida*, 430 U.S. 482, 495 (1977).

³² It is significant to note that in articulating these evidentiary factors this Court opened up the inquiry into the subjective motivation of individual legislators, an area previously left untouched by the courts. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810); *Palmer v. Thompson*, 403 U.S. 217 (1971).

this Court signalled that discriminatory intent was not to be lightly inferred.³³ Indeed, the decisions of this Court subsequent to *Davis* indicate that an inference of discriminatory intent must be substantiated in fact. *Austin Independent School District v. United States*, 429 U.S. 990 (1976); *Dayton Board of Education v. Brinkman*, 433 U.S. 406 (1977); *School District of Omaha v. United States*, 433 U.S. 667 (1977); *Brennan v. Armstrong*, 433 U.S. 672 (1977).³⁴

In this case the district court purported to look to evidence other than impact and to apply a "totality of the relevant facts" test in its search for intentional discrimination. *Feeney*, 451 F. Supp. 143 at 147 (App. 259). The test appears to be derived from the "nonexhaustive" series of six standards enumerated in *Arlington Heights*, 429 U.S. at 266-268. Significantly however, only one of those six specific standards was considered by the district court on remand, and that was the impact of the challenged action. More importantly, the district court ignored the statement in *Arlington Heights* that in order to justify an inference of intent, the disproportionate impact must be "unexplainable on grounds other than race." *Id.*

³³ Several commentators have recognized that principles of federalism and separation of powers require that proof of discriminatory intent in constitutional cases be supported by a significant evidentiary showing. See, Note, "Developments in the Law: Equal Protection," 82 Harv. L. Rev. 1065, 1093-1094 n.101 (1969); A. Bickel, *The Least Dangerous Branch* 216; P. Brest, "Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive," 1971 Sup. Ct. Rev. 95, 129-130 (advocating a standard of clear and convincing evidence).

³⁴ The significance of these remands and the implications as to the plaintiff's burden have been noted by some commentators. Blumberg, "De Facto and De Jure Sex Discrimination Under the Equal Protection Clause: A Reconsideration of the Veterans' Preference in Public Employment," 26 Buffalo L. Rev. 1 (1976); "Proof of Racially Discriminatory Purpose Under the Equal Protection Clause: *Washington v. Davis*, *Arlington Heights*, *Mt. Healthy*, and *Williamsburgh*," 12 Harv. Civ. Rights Civ. Liberties L. Rev. 725 (1977).

at 266. On close scrutiny this totality of the circumstances test used by the district court in its search for invidious purpose is merely a facade behind which the court once again engaged in the now-outmoded impact analysis which characterized its earlier opinion.

While declaring the Massachusetts veterans' preference statute unconstitutional, the district court acknowledged that "the prime legislative *motive* of the challenged statute, that of rewarding public service in the military, was worthy." (Emphasis supplied.) *Feeney v. Massachusetts*, 451 F. Supp. 143, 145 (D. Mass. 1978) (App. 254). The district court noted elsewhere that "the Commonwealth had a salutary *motive*" (emphasis supplied), *Feeney v. Massachusetts*, 451 F. Supp. 143, 150 (D. Mass. 1978) (App. 264), and that the veterans' preference statute "was not enacted for the *purpose* of disqualifying women from receiving civil service appointments." (Emphasis supplied.) 415 F. Supp. at 495 (App. 212). Yet, incredibly, the district court also declared that the "intent" of the veterans' preference statute was to "subordinat[e] employment opportunities of its women." *Feeney v. Massachusetts*, 451 F. Supp. 143, 149-150 (D. Mass. 1978) (App. 264).

This distinction drawn between "motive," "purpose," and "intent" must be viewed as sophistry. *Webster's New Twentieth Century Dictionary*, Unabridged Second Edition, defines "motive" as an "intention" that causes some persons to do something. In turn, it defines "intent" as a "purpose" and defines "purpose" as an "intention."

This Court has never distinguished between a legislature's "intent," "motive" and "purpose" in deciding whether a statute is discriminatory. Rather, in the context of determining a legislature's reasons for passing a statute, this Court has properly used the terms interchangeably. In *Arlington Heights*, 429 U.S. at 265-266, this Court noted:

[I]t is because legislators . . . are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality. . . . When there is a proof that a discriminatory *purpose* has been a *motivating* factor in the decision, this judicial deference is no longer justified. (Emphasis supplied.)

Elsewhere in the *Arlington Heights* opinion, this Court concluded that "[p]roof of racially discriminatory *intent* or *purpose* is required to show a violation of the Equal Protection Clause." (Emphasis supplied.) *Id.* at 265. In *Jefferson v. Hackney*, 406 U.S. 535, 548 (1972), this Court rejected allegations of racial discrimination where acceptance of appellant's constitutional theory rendered suspect differences in treatment, however lacking in racial "motivation." In *Davis*, 426 U.S. at 240, this Court noted that the challengers in *Wright v. Rockefeller*, 376 U.S. 52 (1964), did not prevail because they failed to prove that the New York legislature was "motivated" by racial considerations. However one categorizes the inquiry, the Massachusetts veterans' preference statute was not intended, designed or motivated by a desire to harm women.

1. The Exclusionary Effect of the Veterans' Preference Statute does Not Give Rise to an Inference of Intentional Gender-Based Discrimination.

This Court has recognized that the impact of a governmental act is probative on the issue of intent, but that it is conclusive only in the rarest of cases. *Arlington Heights*, 429 U.S. at 266. Here the lower court has grossly overstated the impact of veterans' preference on women in general and Helen B. Feeney in particular in an obvious attempt to make this case

fall into the latter category. The attempt falls short. The Massachusetts veterans' preference statute does not erect an insurmountable barrier to women seeking employment within the official service of the Commonwealth. The district court was able to conclude that such a barrier exists and that the impact of the statute was devastating only because it was willing to make inappropriate comparisons based on incomplete figures and to attach significance to unquantified and unsubstantiated statements of fact. If the court had properly assessed the relevant evidence before it, it would have concluded that the impact of veterans' preference is insufficient to support an inference of intentional gender-based discrimination.

Recent decisions of this Court indicate that the appropriate statistical comparison in an employment discrimination case is between the composition of the work force and that of the relevant labor market. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977); *Hazelwood School District v. United States*, 433 U.S. 299 (1977).³⁵ In the case at bar the lower court made quite a different comparison. It found a disproportionate impact almost exclusively on the basis of an analysis of the gender of the appointees to positions in the official service between 1963 and 1973. During the relevant period a total of 47,005 such appointments were made. If those appointed were to be classified on the basis of both

³⁵ The fact that the cases cited in text arose under Title VII rather than under the Constitution is of little or no relevance. First, the quest for impact is the same in both species of cases and it is only the weight afforded to impact after it is found which differentiates the two. Second, in *Davis*, a significant evidentiary factor was a comparison between the percentage of young black police recruits and comparably aged young blacks in metropolitan Washington, D.C. 426 U.S. at 235. Finally, in the context of jury selection, this Court has discerned a discriminatory impact of constitutional dimension based on a comparison between the percentage of Mexican-Americans serving on juries and those eligible for selection. *Castaneda v. Partida*, 430 U.S. 482 (1977).

gender and veteran status, the single largest class of such appointees would consist of nonveteran females. During the 10-year period, 19,837 nonveteran females received permanent appointments (42.2 per cent of all those appointed) while veteran males received 14,476 (30.2 per cent) of the appointments. Appointments of nonveteran males numbered 12,318 (26.2 per cent) and only 374 (.8 per cent) veteran females were hired (App. 79). In light of the statistical advantages enjoyed respectively by nonveterans over veterans and nonveteran females over veteran males, it would appear to be difficult at best to argue that veterans' preference results in a grossly disproportionate adverse impact on female applicants. Nevertheless, noting that 57 per cent of those appointed in the 10-year period were males and that 43 per cent were females, the district court found that the impact of veterans' preference was so devastating in Massachusetts that it was indicative of discriminatory intent. Because the analysis failed to consider the percentages of men and women available for work in Massachusetts, its value is suspect.

Had the district court made the appropriate comparison in this case, it would have been compelled to reach precisely the opposite conclusion. Based on the statistical analysis prepared by the United States Department of Labor, one can conclude that the percentage of women in the labor force throughout the nation increased every year from 1963 through 1974, rising from a low of 33.2 per cent to a high of 38.5 per cent in 1974. U.S. Department of Labor, Employment and Training Administration, Employment and Training Report of the President (Table A-1) (1977). The United States Census figures for 1970 indicate that females comprised 39.9 per cent of the labor forces of the Commonwealth. 1970 Census, General Social and Economic Characteristics, Massachusetts, Table 53. The figures suggest that, even within the official service, the Commonwealth consistently exceeded proportional hiring through-

out the period 1963-1973. Thus one can hardly rely on a straight statistical analysis and still assert that a gross statistical disparity or stark pattern of discrimination against females exists in the Massachusetts civil service system.

As the district court observed, the statistical analysis does not tell the entire story with respect to the job opportunities available to women in the Commonwealth. Concededly, males and females do not always compete for the same jobs, and "a greater proportion of the male appointees than female appointees in permanent positions are in the higher grade and higher paying positions" (App. 79). However, these facts have not and cannot be linked to veterans' preference. While the Agreed Statement of Facts also suggests that the application of the veterans' preference statute has on occasion resulted in a greater proportion of male eligibles than female eligibles being certified, this impact is not quantified and certainly no clear pattern emerges from it. This case simply does not present an occasion in which a clear pattern, "unexplainable on grounds other than [gender-based discrimination]" emerges. *Arlington Heights, supra*, 429 U.S. at 266. Accordingly, a purpose to discriminate against women cannot be inferred from the impact of the statute on female civil service applicants. Compare, *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

Similarly, one cannot infer from the employment record of Helen B. Feeney that Mass. Gen. Laws c. 31, § 23, has had a permanent devastating impact on her career opportunities. Despite the fact that large numbers of Vietnam-era veterans were returning to the work force throughout the relevant time frame, Ms. Feeney consistently held a meaningful position in the official service through March 28, 1975 (App. 176). Furthermore, as Justice Murray pointed out in his dissent and as this brief demonstrates at part III, *infra*, even if Massachusetts utilized a five and ten point preference modeled on the federal

law, application of that preference would have nullified Ms. Feeney's opportunities for appointment to the specific positions she sought but failed to obtain under Massachusetts law. See part III, *infra*, at pp. 55-56.

Simply stated, Mass. Gen. Laws c. 31, § 23, has no greater impact on the employment opportunities of women than any other effective veterans' preference statute. If the kind of impact established by the record in this case is sufficient to support an inference of intentional gender-based discrimination, then every veterans' preference statute in the country is in jeopardy.

2. The District Court Mistakenly Relied on the Foreseeability of Impact of the Veterans' Preference Statute and its Perceived Lack of Job-Relatedness.

The district court isolated two other factors it deemed indicative of invidiousness: the foreseeability of the statute's impact and its perceived lack of job-relatedness. These factors are insufficiently indicative of intent. At the heart of the lower court's analysis is the premise that the foreseeable impact of veterans' preference is the reduction of job opportunities for women, and that intent to discriminate against females can be inferred from that fact. The argument is that the number of female veterans is small, that the Massachusetts legislature was presumptively aware of that fact when it enacted the statute, and that the legislature intended the natural and foreseeable adverse effect on nonveteran females worked by veterans' preference.

The lower court's obligation after *Washington v. Davis*, 426 U.S. 229 (1976), to look to all other evidence is not satisfied by the mere application of the "foreseeability of impact" test.

In the absence of other significant evidentiary factors, mere legislative awareness that a legitimate governmental action or

policy will have a disproportionate impact on a minority will not support an inference of discriminatory intent. See, e.g., *Austin Independent School District v. United States*, 429 U.S. 990, 991 n.1 (1976); *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144 (1977). In *Carey*, Mr. Justice Stewart, joined by Mr. Justice Powell, stated: "That the legislature was aware of race when it drew the district lines might also suggest discriminatory purpose. Such awareness is not, however, the equivalent of discriminatory intent." *Id.* at 180 (Stewart, J., concurring). The use of foreseeability of impact as the *sine qua non* of invidious intent has been convincingly repudiated by lower federal courts, which have repeatedly noted that the awareness of a disproportionate impact is not the equivalent of invidious intent. *United States v. City of Chicago*, 549 F. 2d 415, 435 (7th Cir. 1977); *Guardians Assoc. of New York City Police Department v. Civil Service Commission*, 431 F. Supp. 526, 534 (S.D. N.Y. 1977); and see, *United States v. Texas Education Agency*, 564 F. 2d 162, 168 (5th Cir. 1977).

In drawing an inference of discriminatory intent based on the presumed legislative awareness of the disproportionate impact of a veterans' preference on women, the court apparently applied a purely objective standard of intent traditionally associated with tort law. But, "[t]he principle applied in tort and criminal actions, that an actor is presumed to intend the natural and foreseeable consequences of his deeds, must yield to the entirely different considerations at work when a federal court is addressing an equal protection challenge to state legislation." *Feeney v. Massachusetts*, 451 F. Supp. 143, 155 (D. Mass. 1978) (App. 275) (Murray, J., dissenting). In applying this standard, the lower court inappropriately gave conclusive effect to the foreseeability of the perceived impact of the veterans' preference statute.

Under certain circumstances, the foreseeability of a discriminatory impact may well be one of several relevant considerations in seeking to determine legislative motive. As one element in the calculus, foreseeability of impact may prove useful. That a disadvantageous result is foreseeable, however, is of limited utility when assessing a statute like veterans' preference where the impact may so clearly be "explained on reasons other than gender."

Similar considerations significantly undermine the probative value of the third factor identified by the district court as being indicative of invidious intent — the statute's perceived lack of job-relatedness. If the only purpose served by Mass. Gen. Laws c. 31, § 23, were the promotion of an effective civil service system, then extension of a hiring preference to those passing entrance examinations could be perceived as a departure from the norm which might be indicative of discriminatory intent. Even then, however, it might legitimately be argued that military service imparts certain values and training so that veterans as a class are better qualified for civilian service than nonveterans. *Feeney v. Massachusetts*, 451 F. Supp. 143, 154 (D. Mass. 1978) (App. 274) (dissent of Murray, J.); *Feinerman v. Jones*, 356 F. Supp. 252, 260 (M.D. Pa. 1973).

In any event, promoting an effective civil service is manifestly neither the only nor the primary purpose behind Mass. Gen. Laws c. 31, § 23. As the district court itself has recognized, "the prime legislative motive of the challenged statute . . . [is] rewarding public service in the military," *Feeney v. Massachusetts*, 451 F. Supp. 143, 145 (D. Mass. 1978) (App. 254), and that is a perfectly legitimate, noninvidious goal. Thus all that can be said about the perceived lack of job-relatedness is that it is indicative of an intent to benefit veterans; it says nothing about an intent to discriminate against women. The same is true of any affirmative action hiring program which supersedes or supplements normal hiring patterns.

3. The District Court Ignored Arguments which Irrefutably Demonstrated the Lack of Intentional Gender-Based Discrimination.

In ascribing an illicit motive to the Massachusetts legislature, the district court ignored a number of factors which rebut any inference that the veterans' preference statute was designed to harm women. First among those factors is the legislative history of the preference itself, which is set forth in some detail in part IA of the Argument section in this brief.

Two significant conclusions may be drawn from that history. The first is that the extension of benefits to veterans in Massachusetts has historically occurred during or immediately following periods of armed conflict (*see* part IA, *supra*, at pp. 15-24). This fact illustrates that the legislative motivation for the extension of veterans' preference is a desire: (1) to reward those who have sacrificed in the service of their country; (2) to assist veterans in their readjustment to civilian life; and (3) to encourage patriotic service. *Brown v. Russell*, 166 Mass. 14, 43 N.E. 1005 (1896); *Opinion of the Justices*, 190 Mass. 611, 77 N.E. 820 (1906); *Hutcheson v. Director of Civil Service*, 361 Mass. 480, 281 N.E. 2d 53 (1972); *Mitchell v. Cohen*, 333 U.S. 411 (1948); *Johnson v. Robison*, 415 U.S. 361 (1974).

Second, the history demonstrates that as the federal government has expanded wartime "opportunities" for women to participate in the military, Massachusetts has consistently extended veterans' preference to the women who have availed themselves of the opportunity. *See*, pp. 22-24 *supra*. In each of the substantive revisions of Mass. Gen. Laws c. 31, § 23, and its precursors which has occurred since women first entered the military service in World War I, Massachusetts legislators have consistently provided for hiring preferences for those women. *See, e.g.*, Mass. St. 1919, c. 150; Mass. St. 1943, c. 194; Mass. St. 1954, c. 627, § 1.

Obviously, then, the legislative history does not suggest that the veterans' preference law is a "mere pretext" to mask invidious discrimination against females. *Geduldig v. Aiello*, 417 U.S. 484 (1974). The record in this case simply provides no logical basis for an assumption that the General Court would have enacted a less generous preference if more substantial numbers of women qualified as veterans, yet Appellants submit that this is precisely the type of assumption a court would have to make if it were to infer intentional discrimination in this case.

The district court also ignored the affirmative efforts of the Commonwealth to enhance the employment opportunities of women, perhaps the most significant of which were the state's ratification of the federal Equal Rights Amendment and its passage of a similar amendment to the State Constitution.³⁶ The unqualified support of these amendments, which are clearly designed to protect the rights of women, is an outward manifestation of intent which belies the notion that the state legislature is motivated by a desire to deny employment rights to females.

Viewed in context, the efforts of the Commonwealth in affording employment opportunities to females are laudable and progressive. The General Court has also eliminated sex-specific jobs in the civil service system, Mass. St. 1971, cc. 219, 221, and has expanded the range of jobs not subject to veterans' preference in the face of an assertion that the preference kept women from attaining goods jobs.³⁷ Similarly, the

³⁶ On June 21, 1972, the General Court ratified the proposed Equal Rights Amendment to the United States Constitution. The General Court also ratified a proposed Equal Rights Amendment to the Massachusetts Constitution in two successive legislatures as required by Mass. Const. Amendments, Art. 48, Init., part IV, §§ 1-5, on August 15, 1973, by a vote of 266-0 and on May 14, 1975, by a successive, separately elected legislature, 217-55.

³⁷ In addition to eliminating gender-based distinctions in the civil service law, the General Court has greatly expanded the number of positions which

executive branch, through such devices as Mass. Exec. Order 116 (1975) has promoted the recruitment and appointment of females as if they were a disadvantaged minority.³⁸

The employment practices of the Commonwealth are, therefore, totally inconsistent with any notion of intentional sex discrimination. Indeed, they demonstrate a pattern and practice of affirmative state action designed to guarantee equal employment opportunities for women. Nevertheless, the district court did not even consider these factors, which should have conclusively resolved the issue of illicit motive in favor of the Appellants. Its failure to do so is unexplainable on grounds other than its demonstrated desire to achieve a result which it felt socially acceptable.

III. THE ORIGINAL DISTRICT COURT OPINION IMPROPERLY APPLIED A LEAST RESTRICTIVE ALTERNATIVE TEST IN ASSESSING THE CONSTITUTIONALITY OF THE MASSACHUSETTS VETERANS' PREFERENCE STATUTE.

Having determined that *Davis* is distinguishable from this case and, in the alternative, that the veterans' preference

are excluded from civil service coverage. Mass. Gen. Laws c. 31, § 5. The statute has been amended 16 times since 1967. One of the most significant amendments was Mass. St. 1975, c. 134, which eliminated attorneys from civil service coverage and therefore mooted the actions of plaintiffs in the *Anthony* case. *Anthony v. Massachusetts*, 415 F. Supp. 485, 492 (D. Mass. 1976) (App. 208-209). See also, Mass. St. 1977, c. 822; Mass. St. 1977, c. 815.

³⁸In 1975, the Governor of the Commonwealth issued Mass. Exec. Order 116, revising and amending Mass. Exec. Order 74, Governor's Code of Fair Practices, which is designed to implement a program of affirmative action within each state agency to ensure:

... that the percentage racial and sexual makeup of the state work force should, at all levels, reflect the percentage racial and sexual makeup of the population where jobs exist. (Emphasis supplied.)

statute intentionally discriminates against women, the lower court found it unnecessary to reconsider and revise its earlier opinion. A finding on the issue of intent, however necessary it may be in analyzing the constitutionality of a facially neutral state statute, should not terminate a court's equal protection analysis. On the contrary, a finding on the issue is merely the starting point in that analysis. In the instant case the district court undertook no new analysis, and the arguments presented herein are therefore addressed primarily to the prior opinion appearing at 415 F. Supp. 485 (D. Mass. 1976) (App. 195-240).

While a finding that the veterans' preference statute does not intentionally discriminate against women does not terminate the equal protection analysis, it is virtually outcome-determinative. Without a finding of purposeful gender-based discrimination, a reviewing court would be forced to assess the disparate treatment of veterans and nonveterans only on the basis of the rational basis standard. This is so because the right to government employment is not fundamental in and of itself, *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313 (1976), and because the distinction between veterans and nonveterans is not based on a suspect classification.³⁹

Measured against the rational basis standard, Mass. Gen. Laws c. 31, § 23, would easily have withstood judicial scrutiny. Prior to the original decision of the court below, veterans' preference statutes⁴⁰ were uniformly upheld by the federal courts whenever challenged as a violation of the Equal

³⁹Only three classifications have been found suspect by the Supreme Court. They are race, *McLaughlin v. Florida*, 379 U.S. 184 (1964); ancestry or national origin, *Oyama v. California*, 332 U.S. 633 (1948); and alienage, *Graham v. Richardson*, 403 U.S. 365 (1971). See generally, *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 16 (1973).

⁴⁰Cf. *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953) (upholding a veterans' preference in the private sector).

Protection Clause. *Fredrick v. United States*, 507 F. 2d 1264 (Ct. Cl. 1974); *Rios v. Dillman*, 499 F. 2d 329 (5th Cir. 1974); *White v. Gates*, 253 F. 2d 868 (D.C. Cir.), *cert. denied*, 356 U.S. 973 (1958); *Reynolds v. Lovett*, 201 F. 2d 181 (D.C. Cir. 1952), *cert. denied, sub nom. Wilson v. Reynolds*, 345 U.S. 926 (1953); *August v. Bronstein*, 369 F. Supp. 190 (S.D. N.Y.), *aff'd mem.* 417 U.S. 901 (1974); *Feinerman v. Jones*, 356 F. Supp. 252 (M.D. Pa. 1973); *Koelfgen v. Jackson*, 355 F. Supp. 243 (D. Minn. 1972), *aff'd mem.* 410 U.S. 976 (1973); *Russell v. Hodges*, 470 F. 2d 212, 218 (2d Cir. 1972).

Since that original opinion, and this Court's decision in *Davis*, three courts have assessed veterans' preference statutes subjected to equal protection challenge. *Bannerman v. Department of Youth Authority*, 436 F. Supp. 1273 (N.D. Cal. 1977); *Branch v. Du Bois*, 418 F. Supp. 1128 (N.D. Ill. 1976); *Ballou v. State Department of Civil Service*, 148 N.J. Super, 112, 372 A. 2d 333 (1977). Each applied a rational basis test and, after distinguishing *Anthony v. Massachusetts*, and concluding that no intent to harm women was present, each upheld the challenged veterans' preference statute. Given the admitted legitimacy of the state interests furthered by veterans' preference legislation, *Anthony v. Massachusetts*, 415 F. Supp. 485, 496 (D. Mass. 1976) (App. 213), the district court in this case could only have reached the same conclusion had it applied the rational basis test.

Assuming, *arguendo*, that the district court was correct in inferring that the statute was intended to harm women, the court still utilized an incorrect standard in assessing that statute's constitutionality. A statute which only implicitly draws lines based on gender can be subjected to no more intensive an inquiry than one which draws those lines explicitly. While some earlier gender-based cases were less than explicit on the appropriate standard of review, *see, e.g., Reed v. Reed*, 404 U.S. 71 (1971); *Frontiero v. Richardson*, 411 U.S. 677

(1973); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975), a single standard has now emerged which requires that gender-based classifications must be substantially related to the achievement of important governmental objectives. *Craig v. Boren*, 429 U.S. 190 (1976); *Califano v. Goldfarb*, 430 U.S. 199 (1977). This Court has never applied "a least restrictive alternative" test in any of these gender-based cases. Nevertheless, it appears that the district court in this case, in fact, engaged in the kind of least restrictive alternative analysis usually reserved for strict scrutiny cases.⁴¹ In the words of the district court:

[T]he fact is that there are alternatives available to the state to achieve its purpose of aiding veterans, without doing so at the singular expense of another identifiable class, its women. . . . Given the fact that effective, but less drastic, alternatives are available, the state may not give an absolute and permanent preference in the area of public employment to its veterans at the expense of its women who, because of circumstances totally beyond their control, have little if any chance of becoming members of the preferred class. *Anthony v. Massachusetts*, 415 F. Supp. 485, 499 (D. Mass. 1976) (App. 219-220).

⁴¹ If this Court were to endorse the use of a least restrictive alternative test as a component of the assessment of sex-based classifications, it would in effect make gender a suspect classification. This is so because the Court already requires that sex-based classifications must be substantially related to the achievement of important governmental objectives, a standard which may not differ markedly from the compelling state interest test applied in strict scrutiny cases. To date this Court has not been compelled to designate sex as "suspect" and to treat sex-based cases under a strict scrutiny test. *Stanton v. Stanton*, 421 U.S. 7, 13 (1975).

On remand the majority again stated:

The fact that there are less drastic alternatives available to the state to achieve its purpose of aiding veterans, underscores our conclusion that the absolute and permanent preferences adopted by the Commonwealth resulted from improper evaluation of competing considerations. *Feeney v. Massachusetts*, 451 F. Supp. 143, 150 (D. Mass. 1978) (App. 265).

Specifically, the district court implied that a point system modelled on the federal civil service statutes, 5 U.S.C. §§ 2108, 3309, 3311-3312 and 3316, was a less burdensome statute which was appropriately "designed to offer some reward for length of service in the armed forces and/or to recognize particular abilities or skills likely to have been acquired as a result of military service." *Anthony v. Massachusetts*, 415 F. Supp. 485, 499 (D. Mass. 1976) (App. 219-220).

This search for a less onerous alternative was not only incorrect as a matter of constitutional doctrine, it was also imperfect in fact. The majority opinion's acceptance of and advocacy for the federal "five and ten" point preference as a less restrictive alternative was made without any evidence concerning the effects of the federal veterans' preference. Available statistics suggest that the point system embodied in federal law is not demonstrably less restrictive than the Massachusetts positional preference.

In order validly to compare the state and federal civil service systems, one must assess their respective impact on women as a group and their effect (hypothetical in the case of the federal system) on Helen Feeney as an individual. As we have already demonstrated in part IIB(1), *supra*, in Massachusetts women obtained 43 per cent of the appointments to official

service positions during the 10-year period from 1963-1973. While the Commonwealth has been unable to ascertain the percentage of federal civil service appointments received by women in the same period, it does appear that the percentage of males in such federal positions (67.7 per cent) far exceeds the percentage of women occupying similar positions (32.3 per cent). U.S. Civil Service Commission, Bureau of Manpower Information Systems, Central Personnel Data File, Overview Report (June 30, 1977). A comparison between these two sets of figures, while imperfect, nevertheless indicates that the Massachusetts positional preference law has no more devastating an impact on females than the federal point system. Available sources also suggest that in federal as well as state employment, (a) males often hold better positions than females, and (b) the application of a veterans' hiring preference on occasion results in more male eligibles being certified than females. Hearings on Veterans' Preference Oversight before the Subcommittee on Civil Service of the House Committee on Post Office and Civil Service, 95th Cong., 1st Sess. (1977) (comments of representative Frenzel).

As the dissenting opinion in the court below suggests, the end result of applying a five and ten point preference to the specific examinations which form the basis for Helen Feeney's compliant would be substantially the same as under the Massachusetts positional preference law. *Anthony v. Massachusetts*, 415 F. Supp. 485, 507 n.14 (D. Mass. 1976) (App. 239-240). (Murray, J., dissenting). For example, on the February 24, 1973, eligibility list, from which three names were to be certified and one person appointed to the position of Solomon Head Administrative Assistant, Ms. Feeney finished third solely on the basis of her examination (App. 76). Application of Mass. Gen. Laws c. 31, § 23, caused her to be ranked eleventh (App. 104-105), but even under a five and ten point system she would have been ranked sixth, well below the

point of certifiability. Similarly, on the May 18, 1974, examination, Ms. Feeney's examination score placed her in a five-way tie for the seventeenth position (App. 77). Under the Massachusetts positional preference she was ultimately ranked seventieth (App. 113-130), but even under the federal point system she would have dropped to a five-way tie for thirty-eighth position. Again, the final result is the same; Ms. Feeney would not be likely to obtain an appointment under either system.

Any competitive preference for veterans will have a corresponding collateral effect on nonveterans, including nonveteran females. Here, if there is a demonstrable difference between the effect of the Massachusetts position preference system and the Federal point system, it is minimal. The fact that the district court here failed to assess adequately the differences in the two systems only serves to underscore the fact, demonstrated in Part IB of this Argument, that the legislature is the appropriate forum for formulating veterans' benefits policies and designing appropriate veterans' preference statutes.

In summary, the district court erred at each significant point in its analysis and in each instance the error was caused by a misplaced reliance on the impact of the Massachusetts positional preference law. The court invoked the perceived impact of the statute first to support its untenable conclusion that the challenged statute is not facially neutral, then to support what amounted to an irrefutable inference of intentional gender-based discrimination, and finally to suggest that there were less burdensome alternatives available to the Massachusetts legislature. This talismanic invocation of the impact of the statute is not only based on a flawed assessment of the effect of Mass. Gen. Laws c. 31, § 23, but it is also totally inconsistent with *Washington v. Davis*, 426 U.S. 229 (1976). Accordingly, this Court should reverse the district court and hold

that the Massachusetts veterans' preference statute does not deny Helen B. Feeney equal protection of the law.

Conclusion.

For the reasons stated above, the judgment and order of the district court should be reversed.

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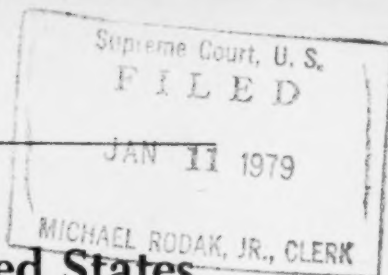
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Dated: November 24, 1978.

**In the
Supreme Court of the United States.**



OCTOBER TERM, 1978.

No. 78-233.

PERSONNEL ADMINISTRATOR OF THE
COMMONWEALTH OF MASSACHUSETTS ET AL.,
APPELLANTS,
v.
HELEN B. FEENEY,
APPELLEE.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS.

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In the Supreme Court of the United States.

OCTOBER TERM, 1978.

No. 78-233.

PERSONNEL ADMINISTRATOR OF THE
COMMONWEALTH OF MASSACHUSETTS ET AL.,
APPELLANTS,

v.

HELEN B. FEENEY,
APPELLEE.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF FOR THE APPELLEE.

Question Presented.

Does Mass. Gen. Laws c. 31, § 23, which excludes women from competitive civil service positions by granting a permanent and absolute preference to veterans, violate the Fourteenth Amendment to the Constitution of the United States?

Statement of the Case.

I. PRIOR PROCEEDINGS.

On May 20, 1975, Helen B. Feeney, the appellee here, brought this action in the United States District Court for the District of Massachusetts under 42 U.S.C. § 1983 against the Commonwealth of Massachusetts, its Division of Civil Service, the Director of Civil Service and the members of the Massachusetts Civil Service Commission.¹ The complaint alleged that the plaintiff, a non-veteran woman, had passed the civil service examinations for two administrative positions in state government with high scores, but that she was precluded from consideration for those positions by Massachusetts' absolute veterans' preference formula. She claimed that the statutory scheme, Mass. Gen. Laws c. 31, § 23,² and the operative regulations of the Division of Civil Service, violated the Fourteenth Amendment to the United States Constitution and sought an injunction against their enforcement.

With the consent of all parties, the district court entered a temporary restraining order prohibiting the defendants from filling any of the positions sought by the plaintiff. The action was consolidated with a previously filed action challenging the same statutory scheme. A three-judge court was convened pursuant to 28 U.S.C. § 2284 to hear the case. The parties

¹ The position of Director of Civil Service has since been eliminated and its duties transferred to the position of Personnel Administrator of the Commonwealth of Massachusetts.

² The civil service laws were recodified by Mass. St. 1978, c. 393. Under the recodification, Mass. Gen. Laws c. 31, § 23, has been replaced by the first and last paragraphs of Mass. Gen. Laws c. 31, § 26. This recodification does not effect any substantive changes in the relevant statutes. For the convenience of the Court, the veterans' preference statute is referred to herein as Mass. Gen. Laws c. 31, § 23. Other references to Mass. Gen. Laws c. 31 are to the sections as they existed prior to recodification.

submitted a lengthy statement of facts in each case describing in detail the Massachusetts civil service system and the history and operation of the veterans' preference statute within that system. The district court also considered the affidavit of the plaintiff, describing her efforts over the years to obtain appointment to various civil service positions, and the affidavit of Edward W. Powers, a former Director of Civil Service and named defendant, in which he conceded that the veterans' preference statute drastically restricts employment opportunities for women in Massachusetts' civil service.

On March 29, 1976, the district court entered an order and opinion awarding judgment in favor of plaintiff Feeney against the named individual defendants.³ *Anthony v. Massachusetts*, 415 F. Supp. 485 (D. Mass. 1976) ("*Anthony*") (App. 195). The district court, after carefully reviewing the facts, concluded that the veterans' preference formula, given the virtual exclusion of women from the armed forces, "inescapably" leads to the denial to women of any meaningful opportunity to compete for civil service jobs and held that the statute was unconstitutional.⁴

On August 23, 1976, the Attorney General docketed an appeal (No. 76-265) in this Court on behalf of the Personnel Administrator of the Commonwealth of Massachusetts and the members of the Civil Service Commission. This Court certified to the Supreme Judicial Court of Massachusetts a question relating to the authority of the Attorney General to prosecute the appeal. 429 U.S. 66 (1976). After receipt of the state

³ The Commonwealth of Massachusetts and the Division of Civil Service were dismissed as parties on the ground that they were not "persons" within the meaning of 42 U.S.C. § 1983.

⁴ Following the first decision of the district court, Massachusetts adopted an interim veterans' preference statute. Mass. St. 1976, c. 200, Mass. Gen. Laws c. 31, § 23. (Supp. 1978-1979) (App. to Juris. Statement 51A-53A).

court's response, *Feeney v. Commonwealth*, 366 N.E. 2d 1262 (1977), this Court remanded the case to the district court for further consideration in light of *Washington v. Davis*, 426 U.S. 229 (1976).

On remand, the district court ordered the parties to file supplementary briefs addressed to the specific question raised by this Court's order of remand and heard oral argument addressed to that question. Upon reconsideration of the entire record, including the legislative and administrative history of the veterans' preference statute and the Commonwealth's past restriction of employment opportunities for women, the district court, on May 3, 1978, reaffirmed its original judgment in favor of Helen B. Feeney and again permanently enjoined the individual defendants from utilizing Mass. Gen. Laws c. 31, § 23 (1971), in filling civil service positions. In its second opinion, *Feeney v. Massachusetts*, 451 F. Supp. 143 (D. Mass. 1978) ("*Feeney*"), the district court concluded that women were intentionally disadvantaged by the Commonwealth's adoption and use of an absolute and permanent preference formula.

Despite the factual finding of a purposeful discrimination against women, the Attorney General again appealed to this Court on behalf of the Personnel Administrator of the Commonwealth of Massachusetts and the members of the Civil Service Commission.

II. FACTS OF THIS CASE.

As in most states, public employment in Massachusetts is a major sector of the economy. Massachusetts, through its civil service system, is the single largest employer in the state.⁵ The

⁵Massachusetts civil service law governs the selection and appointment of municipal employees as well as state employees. See Mass. Gen. Laws c. 31, §§ 47 *et seq.*

civil service system covers appointment to approximately 60 % of all public employment positions.⁶ Civil service positions in Massachusetts fall into either of two categories, the classified official service or the classified labor service.⁷ In 1975, approximately 90,000 people held positions in the classified official service alone (App. 72). During the ten-year period from July 1, 1964, through June 30, 1974, nearly 200,000 appointments were made to civil service positions (Ex. 63, p. 23). In the fiscal year ending June 30, 1974, over 11,000 appointments were made to positions in the classified official service, and over 6,000 appointments were made to labor service positions (App. 72) (Ex. 63, p. 24).

To attain a permanent position in the classified official service, an applicant must first pass an examination designed to measure relative ability and fitness to perform the duties of the position for which the examination is given.⁸ On all examinations, applicants receive appropriate credit for relevant experience obtained in the military service (App. 72-73, 184-185).

⁶The positions which are not covered by civil service include those in cities and towns which have not accepted civil service, Mass. Gen. Laws c. 31, § 47, teachers, Mass. Gen. Laws c. 71, employees of the University of Massachusetts, Mass. Gen. Laws c. 75, §§ 14, 24, and of the University of Lowell, Mass. Gen. Laws c. 75A, § 11, seasonal employees and physicians and other medical personnel, Mass. Gen. Laws c. 31, § 5.

⁷The positions sought by the plaintiff are in the classified official service (App. 72). The veterans' preference statute, however, applies to all civil service positions. The principal difference between the two is that there are no examinations for appointments in the labor service. See Annual Report from the Massachusetts Civil Service Commission, 1973-1974, p. 18 (Ex. 63) (hereinafter "Annual Report").

⁸For certain positions, the examination is an "unassembled" examination, which consists merely of assigned scores based upon the applicant's training and experience. For all other positions, including those which are the subject of this action, the relative grades of the applicants are based on a formula which gives weight both to the results of a written examination and to the applicant's training and experience.

An applicant who passes an examination is placed on an "eligible list." An applicant's position on the eligible list, which is crucial to obtaining a civil service job, is not determined in the first instance by examination score. Rather, the veterans' preference statute, Mass. Gen. Laws c. 31, § 23, requires that eligible candidates be listed in the following order: (1) disabled veterans; (2) veterans; (3) widows and widowed mothers of veterans; (4) all others. Candidates within each category are ranked according to their examination scores (App. 73). The eligible list contains the names of all persons who passed the examination, but, as a practical matter, the selection process limits consideration to those whose names appear at or near the top of the list.

Whenever a public agency has a vacancy in a civil service position, it sends a requisition to the Division of Personnel Administration, (the "Division"), stating the number of vacancies. The Division then "certifies" as eligible those candidates whose names appear at the head of the appropriate eligible list. The number certified is fixed by a formula prescribed by the rules of the Division (App. 73-74). The agency will always receive at least two more names than there are vacancies. For example, where there is one vacancy, the agency chooses from among the top three candidates. The appointing authority is required to make the appointment from among those whose names were certified, but is not required to appoint the person highest on the list (App. 73-75).

An eligible list remains in effect for a maximum of two years. A new examination may be given for that position during the life of the existing list. When this occurs, a new eligible list is established and eligibles on the existing list are integrated into the appropriate preference category in the new list (App. 75).

The preference accorded to veterans by Massachusetts law is available to any person who received an honorable discharge

and who served in the armed forces for at least 90 days of active service, at least one day of which was "wartime" service (the statutory definition of wartime service includes the entire period from September 16, 1940, to May 7, 1975),⁹ Mass. Gen. Laws c. 4, § 7, cl. 43, was awarded one of a number of specified campaign badges or the Congressional Medal of Honor, Mass. Gen. Laws c. 31, § 21, or served in certain other specified periods, Mass. Gen. Laws c. 31, § 21A.

In contrast to the five and ten point preferences accorded by the federal veterans' preference scheme, the preference accorded by the Commonwealth to veterans who pass qualifying examinations is absolute. Veterans who pass the examination must be considered ahead of all other eligible persons regardless of score. Moreover, the Commonwealth's veterans' preference law has no time or use restrictions: the preference is available to a veteran for his entire working life; and it may be invoked by a veteran as many times as he wishes to seek employment or a different position in the classified service.¹⁰

Approximately one year prior to the institution of this action, Massachusetts instituted a new civil service policy to give "banded" examinations. Under this policy, the Division gives a single, state-wide examination for each entry-level job classification rather than separate departmental examinations for the same classification. Prior to banding, the eligible list for a particular position within a department could be quite short. Where the examination for that position is "banded" with similar positions in other departments, the eligible list

⁹ A veteran who served between February 1, 1955, and August 4, 1964, must have completed 180 days of active service to be eligible for the preference.

¹⁰ As a result, the principal beneficiaries of the preference are older veterans. See, e.g., Ex. 8 (App. 150-151).

may include hundreds of candidates, many of whom will be veterans (App. 183-184).

The district court found that Massachusetts' absolute veterans' preference formula inescapably causes a "devastating impact" on the employment opportunities of women in the Commonwealth's service, 451 F. Supp. at 149 (App. 262). The consequences described by the district court flow inexorably from the facts that: (i) the selection process used by Massachusetts requires appointment of one of those few persons whose names appear at the top of the eligible list (App. 74); (ii) the veterans' preference statute requires that eligible veterans be placed on the list ahead of all others, regardless of score; and (iii) veterans are almost invariably men, and nearly half of Massachusetts' men are veterans.¹¹

The record in the district court demonstrates the exclusion of women by the absolute preference formula.

The plaintiff, Helen B. Feeney, is a 56-year-old female citizen of the Commonwealth and is not a veteran. She worked for the Commonwealth as a Senior Clerk Stenographer in its Civil Defense Agency from 1963 to 1967 and as Federal Funds and Personnel Coordinator from 1967 to 1975 (App. 83, 175-177). Mrs. Feeney has taken and passed nine civil service examinations. Although over the last ten years she has reviewed the civil service notices of examinations, she did not apply and take examinations for many attractive positions because she considered those steps futile in light of the veterans' preference statute (App. 177-181).

¹¹ More than 98 per cent of all veterans in the Commonwealth are men and nearly 47 per cent of Massachusetts men over 18 are veterans, whereas only 1.8 per cent of the Commonwealth's veterans are women and only 8/10 of 1 per cent of the Commonwealth's women over 18 are veterans (App. 83). Thus, the preferred "veteran" characteristic appears 60 times more frequently among working-age men than among such women.

On February 6, 1971, Mrs. Feeney took an examination for the single position of Assistant Secretary, Board of Dental Examiners. She scored 86.68 (the second highest), but the application of the veterans' preference statute advanced five male veterans, four of them lower-scoring, ahead of her, causing her to be ranked sixth on the eligible list (Ex. 61). Thus, Mrs. Feeney was not even certified for appointment.¹² A male veteran with an examination grade of 78.08 was certified and appointed (App. 82-83).

On February 24, 1973, Mrs. Feeney took an examination for the single position of Head Administrative Assistant, Solomon Mental Health Center. She received a score of 92.32 (the third highest) but the application of the veterans' preference advanced ahead of her 12 male veterans, 11 of whom were lower-scoring, reducing her status to 14th on the eligible list (Ex. 2). Again Mrs. Feeney was not certified as eligible because of the preference and was not considered for the position (App. 107, 178). On or about May 18, 1974, Mrs. Feeney took an examination for Administrative Assistant positions. Although she scored 87, which would have tied her for 17th place on the list, the veterans' preference statute caused her to be ranked 70th behind 64 veterans, 63 of whom were men and 50 of whom had lower scores (App. 132-149, 179). Although no appointments were made to any of the positions to be filled from this list prior to the May 23, 1975, entry of a restraining order in this case (App. 77-78), Mrs. Feeney's opportunity to be certified and considered for appointment to these positions was virtually eliminated because of the veterans' preference (App. 179-180).

¹² The Rules of the Civil Service require certification of three names where there is a single vacancy (App. 73-75). Thus, with the second-highest score and without the application of the veterans' preference, Mrs. Feeney would have been certified for consideration for this position.

Mrs. Feeney's experience was typical of that of the women on the list. Of the 135 men on the Administrative Assistant list (App. 132-149), 63 (47 per cent) received the preference while only one (2.5 per cent) of the 41 women so benefited. Without the preference, 16 of the women (nearly 40 per cent) would have ranked in one of the top 64 places now occupied by veterans (the approximate top third of the list); with the preference, the number of women among the top 64 places is one rather than sixteen. Thirty-seven of the 41 women on the list were, by virtue of the preference, ranked below male veterans who received lower scores. This realignment of the Administrative Assistant list pursuant to the absolute veterans' preference formula meant that virtually all of the women on the list, regardless of scores, would not be certified for appointment. At the time that the list was established, there were 43 positions that could have been filled from this list¹³ (App. 77). As these positions would be filled from those whose names appear at the head of the list, non-veterans could be considered only in the event that virtually all the veterans declined appointment.

The Counsel I list at issue in *Anthony* shows the same pattern. But for application of the preference, nearly half the women (13 of 27) would have ranked in the top 76 places (the approximate top third of the list) now occupied by veterans; the application of the preference totally eliminated women from these top 76 places. Ms. Anthony, whose examination score of 94 was the highest received by any applicant and would have placed her second on the list, was reduced to 77th place behind 73 male veterans who received lower scores and three who received the same score.

¹³ The 43 positions were those held by provisional appointees. Massachusetts law provides that a provisional appointment to fill a civil service position shall be terminated within 30 days after the establishment of an eligible list for such position. Mass. Gen. Laws c. 31, § 15.

The exclusion of women demonstrated in the four lists discussed above is by no means an aberration, but is, rather, the inevitable consequence of the preference. Exhibits 13-62 are 50 eligible lists that have been stipulated by the parties as "examples" (App. 80), and they strongly confirm the exclusion of women worked by the preference. Every one of the lists includes one or more women who, by application of the veterans' preference, were ranked below male veterans with lower scores and were thereby deprived of a certification for appointment which they would have had but for the application of the preference¹⁴ (App. 80).

As appellants have noted, women have not been entirely excluded from the classified official service: 43 % of permanent appointments over a recent 10-year period have been women (App. 79). This statistic, however, must be considered together with the fact that 56 % of the qualifying candidates for permanent appointment during the same period have been women (App. 174), reflecting a disparity of 13 %.¹⁵

The Commonwealth has conceded that, for the "many permanent positions for which males and females have competed, the application of the Veterans' Preference Statute has resulted in a substantially greater proportion of female eligibles than male eligibles not being certified to appointing authorities for appointment to permanent positions" (App. 80). This acknowledgment is echoed in the testimony of Edward W.

¹⁴ Indeed, in 47 of the 50 lists, one or more women whose examination scores rank them among the top three places on their respective lists are reduced in relative ranking by application of the absolute preference. In 32 of the 47, such women are totally eliminated from the top three places on their respective lists.

¹⁵ Utilizing the method of analysis set forth in *Castaneda v. Partida*, 430 U.S. 482, 496 n.17 (1977), this disparity of 13 % is equivalent to more than 56 standard deviations, a figure far in excess of the "two or three" said by this Court to raise an inference of discrimination.

Powers, former Director of Civil Service, who occupied that position as one of the original defendants in this case:

" . . . Women will continue to be employed primarily in the relatively low-paying entry-level clerical positions for which men traditionally do not apply. However, for the relatively high-paying Civil Service positions, such as programmers, planners, psychologists, doctors, administrative assistants, head administrative assistants, etc., the continued use of the Veterans' Preference Statute will result in few, if any, female eligibles being considered and appointed to such positions." Ex. 83 (App. 184).

III. THE EXCLUSION FROM AND LIMITATION OF WOMEN IN THE UNITED STATES ARMED SERVICES.

That more than 98 % of those who qualify for veterans' preference are men is a direct result of the fact that during the years from 1940 to 1975 — the period of wartime service qualifying Massachusetts veterans for the preference — a variety of federal statutes and regulations severely restricted participation in the military by women, barring altogether service by many women, erecting barriers to enlistment by others and sharply restricting opportunities for those who were enlisted.¹⁶

Entrance criteria. Until November 18, 1967, women could not exceed 2 % of the total military personnel in the armed forces, by statutory bar. The Army continued to maintain a 2 % limitation of the Women's Army Corps (WAC) by regula-

¹⁶ App. 84-92. Exs. 90-168. See generally, M. Binkin & S. Bach, *Women and the Military* (1977) pp. 6-13; Note, "The Equal Rights Amendment and the Military," 82 *Yale L.J.* 1533 (1973).

tion until 1978.¹⁷ These restrictions have operated despite the fact that by 1973 85 % of all military jobs were non-combatant in nature.¹⁸

In addition to the absolute limitation of women personnel, various enlistment and appointment criteria have been more stringent for women than for men. Men could enlist at age 17 but, until 1974, women were prevented by statute from enlisting until age 18 (10 U.S.C. § 505 (1975); Exs. 100-104, 108-110, 155) and, until recently, parental consent for enlistment was required of women under 21 but of men only under 18 (App. 85). Women who sought to enlist were subjected to higher mental aptitude, educational and physical requirements (Exs. 93, p. 14; 100-104, 107-110, 123, 154) and have been subjected to more extensive application and screening procedures (Exs. 99, 101, 108, 109, 123), including requirements of personal references and attractive appearance (Exs. 99, 101, 108, 109, 123) and that they not have minor children.¹⁹

Women have faced similar barriers in the special sources of officer procurement. They were not admitted to the three major military academies (App. 84-85), or permitted to participate in the college-level Reserve Officer Training Corps

¹⁷ 32 C.F.R. § 580.4(b) (1975). The Women's Army Corps was abolished in October, 1978. P.L. 95-485, § 820, 92 Stat. 1627 (1978). Other restrictive statutes cited herein may also have been modified or withdrawn since 1975 when the class of veterans eligible for the absolute preference was closed.

¹⁸ 118 Cong. Rec. 54390 (Daily ed. March 21, 1973).

¹⁹ Until the 1970's, the armed services prohibited the enlistment and appointment of married women and women with children younger than 18, while similarly situated men were not so excluded (App. 85; Exs. 99, p. 2; 98, 103, 104). Since approximately 60 % of women in the workforce are married (Ex. 93, p. C-1; U.S. Department of Labor, Employment Standards Administration, Women's Bureau, *Women Workers Today* (1973)), this exclusionary rule alone has had the effect of rendering a majority of women ineligible for veterans' preference under state veterans' preference statutes.

(ROTC). Women who sought direct appointment²⁰ were subjected to more rigorous selection criteria than men with respect to education, physical standards, educational attainment, and special application procedures which have included personal references and statements (Exs. 96-99).²¹

Training and Job Opportunities. Women in the military found far fewer opportunities than were accorded men. Women in the Army were assigned to the Women's Army Corps, while men could express preference for and be assigned to any of approximately 21 branches (10 U.S.C. §§ 505(d) and 3311; Exs. 96-98, 107-109, 117). Until the early 1970s, only approximately 180 Army "Military Occupation Specialities" (MOS) were open to women while some 500 were available to men (of these 180, 43 were open only during periods of mobilization, 77 were clerical or clerical/technical classifications, and 18 were musical band classifications) (Exs. 111-115). Predictably, nearly 95 per cent of Army enlisted women in July 1972 were in medical and administrative classifications (Ex. 93, pp. 26-28). Women were not permitted, under Army policy, to command men (Ex. 92, p. 2). The Navy, Marine Corps and Air Force had similarly limited opportunities for women.²² Few women have risen to high-level military staff positions (Ex. 94, 6-page untitled chart).²³

²⁰ The opportunities for such appointment in the Navy and Marine Corps were statutorily restricted. 10 U.S.C. §§ 5575-77, 5581, 6911, 6913, 8257.

²¹ For example, women but not men were held to requirements of "looks, figure and personality" for assignment to "high level staff" positions in the Washington, D.C., area (Ex. 168, pp. B-10, 11, 21; A-10; C-3).

²² See Ex. 93, pp. 25-28, and Ex. 94: "United States Air Force, Officer Strength with Breakout of Women Nurses/Medical Service and Line Offices," and "United States Navy, Distribution of Personnel."

²³ U.S. Representative Otis Pike at a 1972 Congressional hearing on military strength said of the then existing restrictions on women in the armed forces: "The notion seems to exist in the military that women are nothing but defective men" (Ex. 90, p. 12485).

Advancement Opportunities. As members of the WAC, women's opportunities to advance in rank within the Army were severely limited.²⁴ Until November 1967, the highest position to which Army women could aspire was that of the one full colonel who served as WAC Director.²⁵ Not until 1970 was the first woman appointed to the rank of general in any of the military services, and there were only five such women as of January 1974 (Ex. 92, p. 1). Promotional opportunities for women were limited by their ineligibility for many career-advancing assignments. Women officers in the military have been largely excluded from the senior service schools (e.g., the Command and General Staff College, the Army War College, the Naval War College) to which male officers were sent for advanced training.²⁶

Separation. Until 1967, the statute required women to retire at an earlier age than men.²⁷ Women were subjected to a variety of stricter rules for termination within the military than were men.²⁸

²⁴ Women in the Navy and Marines were also appointed under separate statutory sections, confined to the lowest ranks and limited in their assignments, transfers and promotions. 10 U.S.C. §§ 5590, 5575, 5576, 5577, 5582, 5584, 5586, 5587 (1975).

²⁵ Ex. 92, p. 1; 10 U.S.C. § 3071 (1975).

²⁶ The significance of women's exclusion is reflected in the fact that 95 % of the Army's generals as of August 1, 1973, had attended a war college. Ex. 92, p. 1; 94, "United States Army, Military Education Level of General Officers."

²⁷ 10 U.S.C. § 1255 (1967).

²⁸ Military regulations required the discharge of women who became pregnant or who became the parents of children less than 18 years of age (Exs. 124-127, 133-138, 144-152). Women were also discharged for failure to meet minority and parental consent requirements to which men were not subject (Exs. 130-132). Female nurses and warrant officers were mandatorily retired at younger ages than male officers and warrant officers (Exs. 128, 129).

IV. THE HISTORY OF THE COMMONWEALTH'S VETERANS' PREFERENCE STATUTE.

The first civil service statute in the Commonwealth, enacted in 1884, Mass. St. 1884, c. 320, provided a form of veterans' preference without specific reference to sex. However, the Civil Service Commission rules implementing the statute indicated that personnel requisitions could be made on the basis of sex²⁹:

"In case the request for any such certification, or any law or regulation, shall call for persons of one sex those of that sex shall be certified; otherwise sex shall be disregarded in certification." (Civil Service Rule XIX(3).)

²⁹ Contemporaneous legislative history makes clear that this rule was designed to allow women to be requested expressly for clerical positions. In 1886, vetoing a bill to permit appointment of veterans without regard to civil service rules, the governor characterized as jobs "for which the veterans would not under any circumstances be available" those in "the clerical service for which women were wanted." Civ. Serv. Comm. 2d Ann. Rep. (1886) at 108. In 1887, in its Third Annual Report, the Civil Service Commission expressly addressed the subject of the appointment of women:

"APPOINTMENT OF WOMEN. The clerical service of Massachusetts and her cities is open under the Civil Service Rules to both sexes. It has long been proved that for many of the clerical positions in the public service women are at least as well qualified as men. For these positions, during the year, 109 women were examined, of whom 83 passed and 17 were appointed. In the same branch of the service 37 men were appointed. The Commissioners make no distinction between the sexes in certifying names for appointment. Unless the requisition calls for persons of one sex, names of both sexes, or either sex, according to the standing upon the eligible list, are certified. Any inequality in the number of men, arises either from the necessities of the service or the personal preference of appointing officers." Civ. Serv. Comm. 3d Ann. Rep. at 23 (1887).

In 1895, the Massachusetts legislature passed the first complete veterans' preference statute, Mass. St. 1895, c. 501. The statute provided an absolute preference for veterans who had been examined and found qualified for appointment and stated "nothing herein contained shall be construed to prevent the certification and employment of women." *Id.*, § 1. Section 2 of the statute provided for an absolute preference for all veteran applicants for employment over "all other applicants, not veterans, except women . . ." ³⁰ The absolute preference provided by § 2 of the 1895 statute was challenged under the Massachusetts Constitution in *Brown v. Russell*, 166 Mass. 14 (1896). The court held that an absolute preference for veterans, without regard to their meeting at least minimum qualifications for appointment, was unconstitutional.

In 1896, the legislature first adopted the absolute veterans' preference formula which without substantial changes in its design has remained in effect until the present. Mass. St. 1896, c. 517. Pursuant to this preference statute, Civil Service Rule XXVII(1) provided for single-sex requisitions³¹:

³⁰ The district court noted that "[a]lthough the 1895 statute on its face appears to exempt women from the operation of the veterans' preference with respect to all available jobs, the prior and subsequent legislative history suggest that the statutory language was merely consistent with the pre-existing rule permitting single sex lists. See Civil Service Rule XIX(3) promulgated pursuant to Stat. 1884, ch. 320. . . . Statistics show that the exemption operated only to preserve stereotypically 'female' clerical jobs for women." 451 F. Supp. at 148 n.9 (App. 260-61).

³¹ The 1896 statute may have increased the appointment of women, but only with respect to "clerical service": The Thirteenth Annual Report stated:

"There were 134 more women examined than during the previous year, showing the still growing desire of women to seek employment under the present civil service system, and the inclination of appointment officers to employ them in the clerical service. This inclination may be partly due to the veteran preference provided by the present legislation." Civ. Serv. Comm. 13th Ann. Rep. at 6 (1896).

"Whenever any officer or board having the power of appointment to any office or employment under these rules shall make requisition not expressly calling for women, the commissioners shall certify the names of all veterans who have passed the examination for the position sought, in the order of the respective standing of such veterans upon the list; in case such officer or board shall in the requisition request the certification of women, then the commissioners shall certify the names of the three most eligible women upon the list."

In 1919, a substantive reenactment and reaffirmation of the policy of using an absolute and permanent form of preference was passed to benefit World War I veterans. Mass. St. 1919, c. 150. This statute, *inter alia*, adopted the language of Rule XXVII(1) concerning "female" requisitions and applied the veterans' preference to all requisitions which did not especially call for women. The relevant language of § 2 provided as follows:

"The names of veterans who pass examinations for appointment to any position classified under the civil service shall be placed upon the respective eligible lists in the order of their respective standing, above the names of all other applicants, and upon receipt of a requisition not especially calling for women, names shall be certified from such lists according to the method of certification prescribed by the civil service rules applying to civilians."

In 1921, the veterans' preference provision was recodified in chapter 31 of the General Laws, perpetuating the allowance of single-sex requisitions. Rule 13 of the amended Civil Serv-

ice Rules authorized the Commissioner to respond to a requisition designating sex, stating in part that "[w]henver any appointing officer shall make requisition, the Commissioner shall certify from such list as he shall deem suitable, and may recognize the qualification of sex if so stated in the requisition."

The final and most recent legislative reaffirmation of the policy to utilize an absolute and permanent form of preference occurred in 1954 when the legislature enacted substantial revisions and extended the absolute preference to veterans of the Korean war. Mass. St. 1954, c. 627. In addition to reenacting an absolute form of preference which could be used repeatedly throughout the lifetime of a veteran, the statute continued to reflect the legislative authorization for sex-specific requisitions by exempting the absolute preference in the case of "receipt of a requisition not especially calling for women." Mass. St. 1954, c. 627, § 5. The present form of the preference is virtually identical to that enacted by the legislature in 1954.

In 1971, the legislature deleted the language in the statute which made the preference inapplicable to requisitions especially calling for women, Mass. St. 1971, c. 219. In 1978, an overall recodification of the civil service laws was enacted with no substantive changes with respect to the form of absolute preference. Rather than appearing in Mass. Gen. Laws c. 31, § 23, the absolute preference formula is now codified in Mass. Gen. Laws c. 31, § 26.

Summary of Argument.

Massachusetts accords an absolute and permanent preference to veterans seeking civil service employment. It is absolute in that all veterans who pass the qualifying examination must be considered ahead of all other eligible persons regard-

less of score. It is permanent in that it may be used any number of times for any number of jobs throughout a veteran's lifetime. Because women were barred by law from the military service, the result of this extreme form of preference is that women, no matter how well qualified, are systematically barred from civil service positions whenever they compete with men. Women are thus relegated to those traditionally "female" jobs which are shunned by men. The absolute and permanent preference produces and perpetuates occupational sex-segregation in the civil service system.

The effects upon women caused by the adoption of the absolute and permanent form of preference were intentional and purposeful for two reasons that distinguish it from the neutral writing test at issue in *Washington v. Davis*, 426 U.S. 229 (1976). First, the veterans' preference statute is inherently non-neutral with respect to women, because it incorporates into the hiring process for public service jobs decades of *de jure* discrimination against women by the military services. Second, the discrimination against women was inevitable. When the absolute and permanent form of preference was adopted, it was known to a certainty that its use would exclude women from every civil service position of interest to men. The preferred class is one that by law is closed to women.

While analysis of the objective factors conclusively demonstrates that the exclusionary effects on women were intentional and purposeful, the legislative history and background also show that the choice of the extreme form of preference was prompted by and premised upon the assumption that women would not or should not compete with men for upper-level positions. Rather, the legislators assumed that women would only be interested in and suitable for the traditional "female" jobs of a secretarial or clerical nature.

The defendants did not rebut the evidence of purposeful and intentional discrimination. There was no clear and con-

vincing evidence that the choice of this form of preference was free from the taint of discriminatory factors. Nor is it sufficient merely to point to the legitimate purpose of aiding veterans. The ultimate objective of the statutory scheme does not absolve the Commonwealth of the intended consequences of the specific means — an absolute and permanent preference — which it chose to attain its objective. The Commonwealth showed no actual affirmative action to mitigate the effects of the extreme preference on women.

After finding that the preference intentionally discriminates against women, the district court properly examined the statute to determine whether it is substantially related to the achievement of an important governmental objective. This correctly included an examination of the specific means selected by the state. The Commonwealth failed to meet its burden to demonstrate any convincing rationale for an extreme form of preference as a means to aid veterans. In fact, the preference does not closely serve the goals asserted in support of it by the Commonwealth, and more tailored methods exist which would substantially better serve these goals without systematically excluding women competing for upper-level civil service positions.

Therefore, the absolute and permanent form of preference which was premised upon and perpetuates overbroad assumptions about the "suitable" roles of women in the job market denies to the plaintiff the equal protection of the laws in violation of the Fourteenth Amendment.

Argument.

I. THE DISTRICT COURT CORRECTLY HELD THAT THE LEGISLATURE'S CHOICE OF AN ABSOLUTE AND PERMANENT FORM OF PREFERENCE CONSTITUTED AN INTENTIONAL AND PURPOSEFUL DISCRIMINATION AGAINST WOMEN.

The Commonwealth of Massachusetts operates a civil service system that is segregated by sex. Men occupy the upper-level, higher-paid positions of responsibility,³² while women are relegated to the less responsible, primarily clerical and ministerial positions. "[A]s is conceded by all parties, . . . female appointees are generally clerks and secretaries, lower-grade and lower-paying positions for which men traditionally have not applied. Few, if any, females have ever been considered for the higher positions in the state Civil Service." 415 F. Supp. at 498 (App. 218); *see also* the stipulated testimony of the Director of Civil Service (App. 184).

This "clear pattern of exclusion of women from competitive civil service positions,"³³ 451 F. Supp. at 149 (App. 263), re-

³² The defendants offered no evidence whatsoever that any significant number of women are, in fact, employed in upper-level jobs in the civil service system.

³³ While 56 per cent of the applicants eligible for appointment in a ten-year period were women, only 43 per cent (20,211) of the actual appointees (47,005) were women (App. 79, 174), and a significant percentage of these women "served in lower grade positions for which men traditionally did not apply." 451 F. Supp. at 149 (App. 262). In relying on this 43 per cent figure, *see* Brief for the Appellants, p. 43, defendants are not only oblivious to applicant/appointee ratio but also ignore the crux of this case: that the adoption of an absolute and permanent form of preference inevitably excludes women from positions for which they must compete with men, including the upper-level positions which are the most desired in state service. Indeed, their argument appears to be premised on the stereotypic assumption that a woman should not be seeking an upper-level job, but should be satisfied instead to obtain a lower-level, clerical position.

sults inexorably from the absolute and permanent form of veterans' preference. More than 98 per cent of all veterans in the Commonwealth are men, and only 1.8 per cent of such veterans are women (App. 83). Moreover, 47 per cent of all men in Massachusetts over the age of 18 are veterans (in contrast to 0.8 per cent of all such women) (App. 83), and male veterans eligible for the absolute preference throughout their lifetimes apply for virtually every upper-level civil service position. *See, e.g.*, Exhibits 13 through 62. Since, "[a]s a practical matter . . . the Veterans' Preference replaces testing as the criterion for determining which eligibles will be placed at the top of the list," 415 F. Supp. at 488-489 (App. 198); 451 F. Supp. at 145 (App. 254), male veterans hold virtually every significant civil service appointment in Massachusetts. Because women were barred from becoming veterans, the absolute preference benefits "an already established class," 451 F. Supp. at 151 (App. 268) (Campbell, J., concurring), consisting almost entirely of men,³⁴ and virtually every woman is barred from positions of interest to men.

As the district court found, the absolute preference formula inescapably has a "devastating impact" on the employment opportunities of women. 451 F. Supp. at 149 (App. 262). It operates to make "upper-level state employment a male preserve," *see* 451 F. Supp. at 151 (App. 267) (Campbell, J., concurring), and effects a "near blanket, permanent exclusion of all women from a major sector of employment." *See* 415 F. Supp. at 501 (App. 226) (Campbell, J., concurring).

The Commonwealth asserts that it may not be held to have intended these drastic effects on women unless there is direct evidence that at the time they enacted the veterans' preference statute, the Commonwealth's legislators were subjectively

³⁴ When the preference was first enacted in 1896, the class entitled to the preference consisted entirely of men.

motivated by an "anti-female animus"³⁵ or a "desire to harm women."³⁶ In essence, the Commonwealth is saying that a state may consciously adopt a non-neutral selection classification for public jobs which inevitably and inescapably operates to exclude one sex, and then avoid heightened scrutiny of this classification on the ground that no discrimination against the group was intended. There is nothing in this Court's opinion in *Washington v. Davis*, 426 U.S. 229 (1976), or in any other decision, that supports such an extreme view of what constitutes proof of intentional and purposeful consequences. Proof of subjective ill-will or malice toward a particular group is simply not required by *Davis*. In fact, any requirement of such proof would be particularly inappropriate in sex discrimination cases because, as this Court has repeatedly emphasized, the nature of invidious sex discrimination is not so much a desire to disadvantage or harm women for its own sake, but rather an overriding insensitivity or indifference to their legitimate interests based on "outdated misconceptions concerning the role of females in the home rather than in the 'marketplace and world of ideas.'" *Craig v. Boren*, 429 U.S. 190, 198-199 (1976).

In *Washington v. Davis*, 426 U.S. 229 (1976), this Court confirmed the fundamental proposition that a statute which is neutral on its face should not be held invalid under the Equal Protection Clause of the Fourteenth Amendment solely because it has been shown to have a disproportionate impact on a suspect group or class. Rather, there must be an additional showing that the effects upon the class were intentional and purposeful. The discrimination must be shown to be deliberate and purposeful as opposed to incidental or accidental. *Castaneda v. Partida*, 430 U.S. 482, 494 n.13 (1977).

³⁵Jurisdictional Statement, p. 16.

³⁶Brief for the Appellants, p. 41.

Proof that consequences are intentional and deliberate has never been limited solely to direct proof of subjective states of mind to determine the "desires" of legislators. Such an inquiry is both difficult and limited in usefulness. See *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 130 (1810).

Rather, as this Court recognized in *Davis*, the pertinent inquiry is to examine all the facts and circumstances to determine whether the effects on the class are intentional and purposeful. A first step is to examine, regardless of facial appearances, whether the selection criterion — the veteran classification — is inherently and substantively neutral with respect to gender.³⁷ If it is not, then a finding of intentional discrimination should follow, just as if there were an explicit reference to gender on the face of the statute. Second, the inquiry should focus on whether the choice of an absolute and permanent form of preference inevitably causes one particular class to be excluded.³⁸ If it does, then the exclusion is deliberate and intentional under any reasonable construction of those terms.

The district court examined and analyzed the "totality of the relevant facts," 451 F. Supp. at 147 (App. 259), and concluded that the Commonwealth of Massachusetts had "... intentionally sacrific[ed] the career opportunities of its women in order to benefit veterans . . ." 451 F. Supp. at 150 (App. 265). Its conclusion was properly based on objectively verifiable facts and circumstances that warrant a finding of intentional and purposeful discrimination.

³⁷For example, the writing test in *Davis* was inherently and substantively "neutral" with respect to blacks because it was not "culturally slanted to favor whites." *Id.*, 426 U.S. at 235.

³⁸In *Davis*, the exclusionary effects of the test were not inevitably caused by the test because both blacks and whites have equal opportunity to acquire writing skills. See 451 F. Supp. at 151 (App. 267) (Campbell, J., concurring).

A. *The Veterans' Preference Statute Constitutes Intentional and Purposeful Discrimination Against Women Because It is Inherently Non-Neutral with Respect to Sex.*

Unlike the personnel test in *Davis*, which established "a racially neutral qualification for employment," 426 U.S. at 245, because it was not "culturally slanted to favor whites," *id.* at 235, the absolute veterans' preference formula is "substantively non-neutral" with respect to sex, 451 F. Supp. at 152 (App. 269) (Campbell, J., concurring). The selection criterion — veteran status — is structurally non-neutral with respect to sex because it is inextricably intertwined with laws and regulations that substantially barred or discouraged women from military service.³⁹ As the district court found, "[t]he selection formula, geared as it is to veteran status, is necessarily controlled by federal military proscriptions limiting the eligibility

³⁹ Whether or not these regulations violated the constitutional rights of either women or men is not at issue in this action. However, *see Owens v. Brown*, 455 F. Supp. 291 (D. D.C. 1978), which found at least some restrictions on women by the military to be unconstitutional and which case was not appealed by the federal government. What is relevant is that they indisputably discriminated against women as to initial enlistment and officer recruitment and as to career and advancement opportunities within the services.

The defendants ignore both the fact and the importance of this discrimination when they suggest that the "reasons for the lack of women in the military were social in nature." *See* Brief for the Appellants, p. 36. The persistent and pervasive nature of these discriminatory regulations provides a compelling basis upon which to conclude, as did the district court, that they were largely the reason for the absence of significant numbers of women in the military. Indeed, the plaintiff's experience is illustrative. During World War II, when she inquired as to military enlistment at the age of 18, she was told that, as a woman, she needed parental consent (App. 180), which her mother declined to give. She was told that there were more rigorous physical requirements for women than for men (App. 180). Finally, because she married and had children, she (unlike men) was absolutely barred from the military for at least the 19 years from 1952 through 1971 when she had minor children (App. 175).

of women for participation in the military." 451 F. Supp. at 145 (App. 254). Until 1967, federal law established a 2 per cent quota for women personnel in the armed forces, and the Army — the largest of the armed services — continued to adhere to such a quota. Furthermore, until the 1970's, the armed services prohibited the enlistment of married women, but not of married men. Federal regulations also prohibited the enlistment of women with minor children, but not of men with minor children. While women could not enlist until age 18, and parental consent was required until age 21, men could enlist at 17, and parental consent was required only until age 18. Women were also subjected to more rigorous mental and physical entrance requirements. At the same time, female enlistment was discouraged further by the fact that women in the military were accorded fewer training and advancement opportunities. *See* 415 F. Supp. at 489-490 (App. 200). All of this *de jure* discrimination against women is incorporated wholesale by the veterans' preference statute into the "entirely different sphere of public employment where male preference is not only not the rule but is constitutionally impermissible." 451 F. Supp. at 151 (App. 267). *See generally*, Comment, "Veterans' Public Employment Preference as Sex Discrimination," 90 *Harv. L. Rev.* 805, 811-812 (1977).

Since the Commonwealth's selection criterion extends the *de jure* discrimination of the military into the area of public employment, it is inherently non-neutral with respect to gender. Rather, as the district court found, the Commonwealth's extreme form of preference is "anything but an impartial, neutral policy of selection, with merely an incidental effect on the opportunities for women." 415 F. Supp. at 495 (App. 212). This is because women were by law denied an equal opportunity to become veterans. 415 F. Supp. at 489-490 (App. 199-201). Thus, the statute prefers a class which by operation of law is 98 per cent male. Moreover, the preferred group —

veterans — is a closed class because only veterans who have served during wartime are eligible for the preference. For all these reasons, as Judge Campbell concluded, the “neutrality” of the statute

“is at best skin-deep. The law was sexually skewed from the outset, since the exclusionary effect upon women was not merely predictable but absolutely inescapable and ‘built-in’.” 451 F. Supp. at 151 (App. 268).⁴⁰

The Commonwealth controls, and is responsible for, the employment selection standards and procedures in its civil service system. Its choices are intentional. When it deliberately makes the sexually non-neutral status of veteran a necessary condition of employment, it intentionally and purposefully bars women from upper-level civil service jobs. The defendants’ argument that the Commonwealth is not responsible

⁴⁰ The district court also noted a second aspect of the statute’s inherent non-neutrality that shows a purposeful discrimination. Unlike the selection criterion in *Davis*, which was “designed to serve neutral ends,” *Washington v. Davis*, *supra*, 426 U.S. at 248, the district court found that the absolute and permanent form of veterans’ preference is:

“a deliberate, conscious attempt on the part of the state to aid one clearly identifiable group of its citizens, those who qualify as veterans, . . . at the absolute and permanent disadvantage of another clearly identifiable group, Massachusetts women.”

451 F. Supp. at 146 (App. 256). An avowed and express objective to prefer a particular group to the predominant exclusion of another group is the antithesis of neutrality. The decision to prefer absolutely an established male class is *a priori* a non-neutral decision with respect to women which raises the “. . . serious problems of justice connected with the idea of preference itself.” *Regents of University of California v. Bakke*, ___ U.S. ___, 98 S. Ct. 2733, 2752-53 (1978) (opinion of Powell, J.).

for discrimination against women by the military services⁴¹ misses the point. The Commonwealth is responsible for its decision to incorporate veteran status as the non-neutral operative criterion for selection in the civil service system. This decision makes the resulting discrimination against women purposeful and intentional. See *Washington v. Davis*, *supra*, 426 U.S. at 241; see also *Alexander v. Louisiana*, 405 U.S. 625, 630 (1972) (“. . . [T]he selection procedures themselves were not racially neutral.”).

Defendants emphasize that the veterans’ preference statute is “facially neutral.” See Brief for the Appellants, pp. 32-37. However, the gender-based nature of the classification need not “be express or appear on the face of the statute.” *Washington v. Davis*, *supra*, 426 U.S. at 241. The mere “facial” neutrality of a statute is not determinative, if its structure

⁴¹ Brief for the Appellants, p. 35. Contrary to the defendants’ assertion, as a matter of historical fact, the Commonwealth is partially responsible for discrimination against women by the military services. The Commonwealth directly controls membership in its militia and national guard units, veterans of which may qualify for the civil service preference. Mass. Gen. Laws c. 33, § 2 states that the “militia of the commonwealth shall consist of all able-bodied male citizens . . .” but requires women wishing to serve to apply for membership. More significantly, Mass. Gen. Laws c. 33, § 11, which provides for the composition of the national guard of the Commonwealth, adopts all pertinent federal laws and Department of Defense regulations, including federal enlistment requirements. The Commonwealth has thus directly incorporated all the federal laws and regulations which intentionally exclude women, for which it now denies responsibility, into its own admission practices for state units. In addition, by operation of law, 32 U.S.C. § 325, the state units become part of the federal military forces when such units are mobilized during time of war, as they were during World War II and the Korean War. See [1946] National Guard Bureau, Ann. Rep. of Chief 163-165, 216, 222, 224, 239, 241-242, 259; [1940-1941] National Guard Bureau, Induction of the National Guard of U.S. 3-6, 8, 11 (World War II); [1950-1956] National Guard Bureau, Induction and Release of Army National Guard Units 59 (Korea). Veterans who served in the national guard units on active duty during these periods are eligible for Massachusetts’ absolute preference. Mass. Gen. Laws c. 31, § 23; c. 4, § 7, cl. 43.

necessarily produces discrimination. See, e.g., *Reitman v. Mulkey*, 387 U.S. 369 (1967); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Griffin v. Illinois*, 351 U.S. 12, 17 n.11 (1956) ("But a law nondiscriminatory on its face may be grossly discriminatory in its operation."); *Smith v. Allwright*, 321 U.S. 649, 664 (1944) ("Constitutional rights would be of little value if they could be thus indirectly denied."); *Guinn v. United States*, 238 U.S. 347 (1915). Deliberate and intentional legislative classifications which cause invidious and unequal treatment of a protected class are no less invidious because they are superficially neutral. See, e.g., *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 28 (1971) ("[A]n assignment plan is not acceptable simply because it appears to be neutral."); *Anderson v. Martin*, 375 U.S. 399, 404 (1964) ("Therefore, we view the alleged equality as superficial. Race is the factor upon which the statute operates . . ."); *Goss v. Board of Education*, 373 U.S. 683, 688 (1963) ("The alleged equality — which we view as only superficial — . . . does not save the plans.").⁴²

⁴² Nor does this Court's decision in *Geduldig v. Aiello*, 417 U.S. 484 (1974), hold that heightened judicial scrutiny may not be applied to any statute that appears neutral with respect to gender. *Aiello*, which held that the failure of California's employee-funded sickness and disability plan to provide benefits in cases of normal pregnancy did not discriminate on the basis of sex, differs from this case in a number of crucial respects. See 415 F. Supp. at 495 n.8 (App. 212); Fleming & Shanor, "Veterans' Preferences in Public Employment: Unconstitutional Gender-Discrimination?", 26 *Emory L.J.* 13, 30-33 (1977). First, the insurance plan did not effectively exclude women from benefit eligibility; women as well as men obtained significant benefits. See *Geduldig v. Aiello*, *supra*, 417 U.S. at 496 n.20. Under the veterans' preference formula, by contrast, women are effectively excluded from upper-level civil service positions. Second, the insurance plan did not discriminate "against any definable group or class in terms of the aggregate risk protection derived by that class from the program," *id.* at 496; indeed, the insurance plan in *Aiello* actually provided women with greater benefits than men. *Id.* at 497 n.21. By contrast, the veterans' preference statute clearly imposes a disproportionate burden on women. See 451 F. Supp. at 148-149 (App. 262-

These decisions do not simply analyze statutory language in a vacuum; rather, they review challenged statutes in light of both historical facts and contemporary reality to determine if the statutes, by their structure and design, discriminate against an identifiable group. For example, this Court has invalidated superficially neutral "grandfather" clauses in voting rights cases, recognizing that there exist "sophisticated as well as simple-minded modes of discrimination." *Lane v. Wilson*, 307 U.S. 268, 275 (1939).

What appears neutral should not mask what by its inherently non-neutral structure and design constitutes a purposeful and intentional exclusion of women. The veterans' preference statute incorporates the *de jure* discriminatory hiring policies of the military services into the selection procedures for competitive civil service positions. The resulting effects are not accidental; they could be no more purposeful and deliberate if the statute on its face imposed a 2% quota for women on upper-level positions.

B. *The Inevitability of the Exclusionary Impact Demonstrates a Deliberate and Intentional Discrimination Against Women.*

In addition to concluding that the preference constitutes a non-neutral, discriminatory selection criterion, the district

264); 415 F. Supp. at 497-498 (App. 216-219). Third, *Aiello* involved a necessary effort to set priorities in dispensing the limited resources of a social insurance program. See 415 F. Supp. at 495 n.8 (App. 212). By contrast, this case involves a program which aids veterans "at the absolute and permanent disadvantage of" women, 415 F. Supp. at 496 (App. 213); 451 F. Supp. at 146 (App. 256), despite the existence of less drastic alternatives which would not deprive women of opportunities for public employment in Massachusetts. Finally, *Aiello* essentially involved social welfare legislation, while this case involves the interest of women in a fair opportunity for public employment. Cf. *Turner v. Fouche*, 396 U.S. 346, 362 (1970) (recognizing a "federal constitutional right to be considered for public service without the burden of invidious discriminatory disqualifications").

court found that the Commonwealth's use of an absolute and permanent form of preference *inevitably* excludes women from upper-level civil service positions and produces a sex-segregated workforce. Thus, as the district court noted: "The course of action chosen by the Commonwealth had the inevitable consequence of discriminating against the women of this state." 451 F. Supp. at 150 (App. 264).

Without regard to the individual qualifications of female applicants, Massachusetts has chosen "a preference so absolute that all women, except the very few who are veterans, are effectively and permanently barred from all areas of civil service employment not shunned by men." 415 F. Supp. at 501 (App. 226) (Campbell, J., concurring). Since the Commonwealth has adopted an absolute and permanent form of preference which "replaces testing as the criterion for determining which eligibles will be placed at the top of the list," 415 F. Supp. at 489 (App. 198), the "veteran" criterion inevitably and inexorably excludes women whenever they compete with men.

Furthermore, the legislative history of the statute demonstrates that the Massachusetts legislature knew that an absolute preference would inevitably bar virtually all women from any positions sought by men. This is why the legislature felt it necessary to "protect" jobs "especially calling for women" from the operation of the preference. See pp. 16 to 19, *supra*; 451 F. Supp. at 148 n.9 (App. 260).

The district court reasoned that since the result of excluding women was inevitable at the time the veterans' preference statute was adopted, the legislature must have intended this result as much as it intended the result of benefiting veterans. As Judge Campbell explained:

"This same inevitability of exclusionary impact upon women also undermines the argument of no discriminatory intent. There is a difference between goals and in-

tent. Conceding, as we all must, that the goal here was to benefit the veteran, there is no reason to absolve the legislature from awareness that the means chosen to achieve this goal would freeze women out of all those state jobs actively sought by men. To be sure, the legislature did not wish to harm women. But the cutting-off of women's opportunities was an inevitable concomitant of the chosen scheme — as inevitable as the proposition that if tails is up, heads must be down. Where a law's consequences are *that* inevitable, can they meaningfully be described as unintended?"

451 F. Supp. at 151 (App. 268) (Campbell, J., concurring).

The rule that an actor intends all the inevitable consequences of his actions is one of the most basic in all of the common law, both civil and criminal. See, e.g., Holmes, "Privilege, Malice and Intent," 8 *Harv. L. Rev.* 1 (1894); American Law Institute, *Restatement (Second) of Torts* § 8A⁴³ (1965). As one authority has succinctly explained:

"[s]tated in terms of a formula: Intended consequences include those which (a) represent the very purpose for which an act is done (regardless of likelihood of occur-

⁴³ Comment B to this section states:

"All consequences which the actor desires to bring about are intended, as the word is used in this Restatement. Intent is not, however, limited to consequences which are desired. If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result. As the probability that the consequences will follow decreases, and becomes less than substantial certainty, the actor's conduct loses the character of intent, and becomes mere recklessness, as defined in § 500."

rence), or (b) are known to be substantially certain to result (regardless of desire)."

Perkins, "A Rationale of Mens Rea," 52 *Harv. L. Rev.* 905, 911 (1939). This rule is based on a fundamental substantive judgment that there is no substantial difference, for purposes of assigning legal responsibility for the consequences of an act, between a subjective desire to achieve a harm from one's act, and a complete disregard as to whether the harm results or not. 1 Bishop, *Criminal Law* § 20 (9th ed. 1939).

The rule that decisionmakers intend, and consequently are accountable for, the inevitable and necessary consequences of their actions has been applied by this Court in numerous contexts where, as here, a showing of intent to achieve a particular consequence is required. Thus, the rule has been applied in school desegregation cases under the Fourteenth Amendment ever since the Court announced the principle in *Goss v. Board of Education*, 373 U.S. 683 (1963), that:

"[N]o official transfer plan or provision of which racial segregation is the inevitable consequence may stand under the Fourteenth Amendment." *Id.* at 689.

The same rule was applied again in *Monroe v. Board of Commissioners*, 391 U.S. 450 (1968), where the Court found that a superficially neutral "free transfer" plan operated to allow segregation and that such an "inevitable consequence," *id.* at 459, was sufficient to hold the state accountable for its action. Similarly, in *Monroe v. Pape*, 365 U.S. 167, 187 (1961), overruled in other respects, *Monell v. Department of Social Services*, ___ U.S. ___, 98 S. Ct. 2018 (1978), this Court held that the civil rights statute, 42 U.S.C. § 1983,

"should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions."⁴⁴ See also *Washington v. Davis*, *supra*, 426 U.S. at 254-255 (Stevens, J., concurring).

Following *Washington v. Davis*, *supra*, the various courts of appeals and district courts have also analyzed objective circumstances to determine whether discriminatory intent was sufficiently demonstrated by showing that the unequal effects were the inevitable, natural or substantially certain result of governmental action. See *United States v. School District of Omaha*, 565 F. 2d 127, 128 (8th Cir. 1977), *cert. denied*, 434 U.S. 1064 (1978); *Arthur v. Nyquist*, 573 F. 2d 134, 142-143 (2d Cir.), *cert. denied sub nom. Manch v. Arthur*, No. 78-30 (Oct. 2, 1978); *N.A.A.C.P. v. Lansing Board of Education*, 559 F. 2d 1042, 1046-1048 (6th Cir. 1977), *cert. denied*, 434 U.S. 997 (1977); *United States v. Texas Education Agency*, 579 F. 2d 910, 913-914 (5th Cir. 1978); *Armstrong v. O'Connell*, 451 F. Supp. 817 (E.D. Wis. 1978); see also Note, "Proof of Racially Discriminatory Purpose under the Equal Protection Clause: *Washington v. Davis*, *Arlington Heights, Mt.*

⁴⁴ In addition, the Court has applied the rule that an actor intends those consequences that are inevitably or substantially certain to result from the chosen action in all contexts in which an intent to cause discrimination or some other result is a necessary part of the proof. Thus, in cases arising under § 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(3), which prohibits discrimination for the purpose or with the intent of discouraging union activities, the Court has consistently held that the requisite intent can be established by proof that the employer knew that his actions were virtually certain to cause the discriminatory result. See, e.g., *NLRB v. Great Dane Trailers*, 388 U.S. 26, 33-34 (1967); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 231 (1963); *Radio Officers' Union v. NLRB*, 347 U.S. 17, 44-47 (1954). Similarly, in the context of criminal law, this Court has recognized the sufficiency of proving intent by showing that the consequences necessarily stemmed from the actor's chosen conduct. See *Cramer v. United States*, 325 U.S. 1, 31 (1945); *United States v. Murdock*, 290 U.S. 389, 394-395 (1933); *United States v. Patten*, 226 U.S. 525, 539 (1913); and *Agnew v. United States*, 165 U.S. 36, 50 (1897).

Healthy, and *Williamsburgh*," 12 *Harv. C.R. — C.L. L. Rev.* 725 (1977); Note, "Intent to Segregate: The Omaha Presumption," 44 *Geo. Wash. L. Rev.* 775 (1976).⁴⁵

Moreover, application of the rule that a decisionmaker intends all the inevitable consequences of his act is particularly appropriate in sex discrimination cases. This is because the most pervasive form of invidious sex discrimination, as recognized by this Court, is not a conscious desire or an ultimate objective to harm women, but rather overbroad generalizations and misconceptions about the "suitable" roles for women in society. See *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973); *Craig v. Boren*, 429 U.S. 190, 198-199 (1976). While such discrimination may at times lead to explicit sex classifications, it may also lead, as here, to statutory classifications which, while not expressly referring to gender, were obviously enacted in complete disregard of the legitimate interests of women. It would simply make no sense to apply one level of scrutiny to the former type of classification on the ground that an intent to discriminate against women was present, and a different level of scrutiny to the latter type of classification on the ground that it was not.

Additionally, a rule that an actor intends all the inevitable consequences of his act is sufficiently strict — dependent, as it is, on proof that the result in question was substantially certain to occur or was inevitable — that its application in cases aris-

⁴⁵ The decisions cited in the Brief for the Appellants, p. 46, i.e., *United States v. City of Chicago*, 549 F. 2d 415 (7th Cir.), *cert. denied*, 434 U.S. 875 (1977), and *Guardian Association of New York City Police Department v. Civil Service Commission*, 431 F. Supp. 526 (S.D. N.Y.), *vacated and remanded*, 562 F. 2d 38 (2d Cir. 1977), are clearly not to the contrary. Those cases were identical to *Washington v. Davis*, *supra*, in that they involved the use of tests which were racially neutral and did not in any sense inevitably exclude blacks or other minorities. Thus, there was no occasion for the courts to consider the "inevitable consequences" rule as here discussed.

ing under the Equal Protection Clause will not lead to the wholesale invalidation of statutes or other official acts, which was the principal concern articulated by this Court in *Washington v. Davis*. See 426 U.S. at 248 n.14. Rather, the rule is properly applied only where, as here, the legislature has adopted a classification which, while not explicitly saying so on its face, "inevitably" or "inescapably" excludes a particular class of persons. Under these circumstances, the district court properly concluded that the exclusion of women was an intended and purposeful result of the chosen form of preference.

II. DISCRIMINATORY ASSUMPTIONS ABOUT THE ROLE OF WOMEN SUBSTANTIALLY AFFECTED THE LEGISLATORS' DECISION TO ADOPT AN ABSOLUTE AND PERMANENT FORM OF VETERANS' PREFERENCE.

The district court's analysis of all the "objective evidence"⁴⁶ showed that the systematic exclusion of women when they compete with men for upper-level positions inevitably resulted from the operation of a non-neutral selection criterion that incorporates the *de jure* sex discrimination by the military services. This was sufficient by itself to establish the requisite purposeful and intentional nature of the state's treatment of women. However, even if such objective evidence were lacking, intentional discrimination could be established by evidence that discriminatory perceptions of and assumptions concerning women affected the subjective state of mind of legislators during the decisionmaking process.⁴⁷ *Arlington Heights v.*

⁴⁶ *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 421 (1977) (Stevens, J., concurring).

⁴⁷ The defendants erroneously argue that *Arlington Heights* requires the plaintiff to prove "that the statute was motivated by an anti-female animus," Jurisdictional Statement, p. 16, or "by a desire to harm women." Brief for

Metropolitan Housing Corp., 429 U.S. 252, 265-267 (1977). This Court's approval in *Arlington Heights* of the use of such an inquiry recognizes that "numerous competing considerations" are involved in the deliberations of legislators but confirms that impermissible class-related distinctions are not a proper influencing factor in legislative decisionmaking.⁴⁸ See *Arlington Heights v. Metropolitan Housing Corp.*, *supra*, at 265.⁴⁹

Thus, it is relevant whether the legislators, in adopting and maintaining an absolute and permanent form of preference, were influenced by "'archaic and overbroad' generalizations,"

the Appellants, p. 41. It is simply not the law that proof of "purposeful" or "intentional" discrimination against a particular class necessitates evidence of a conscious subjective "malice" or "ill will." The defendants have not pointed to, and the plaintiff has not found, any decision by this Court holding that proof of "purposeful" and "intentional" discrimination requires proof of a malicious, odious or an "anti-female" state of mind. "It is, of course, essential to equal protection analysis to have a firm grasp upon the nature of the discrimination at issue." See *San Antonio School District v. Rodriguez*, 411 U.S. 1, 94 (1973) (Marshall, J., dissenting). Sex discrimination is decisionmaking that is premised upon and caused by impermissible generalizations about the role of women in society that is often rationalized in the form of "protecting" women. See *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973); *Califano v. Goldfarb*, 430 U.S. 199, 211 (1977).

⁴⁸ The operation of class-related distinctions, such as stereotypes about women or minorities, upon the decisionmakers does not even have to be a conscious influence. In *Hernandez v. Texas*, 347 U.S. 475 (1954), for example, this Court found an intent or purpose to discriminate from an analysis of objective evidence of systematic exclusion of minorities from juries. Despite the testimony of the defendant jury commissioners that "their only objective had been to select those whom they thought were best qualified," *id.* at 481, the Court concluded that the "result bespeaks discrimination, whether or not it was a conscious decision on the part of any individual jury commissioner." *Id.* at 482. See also *Alexander v. Louisiana*, *supra*, 405 U.S. at 632.

⁴⁹ The Court's decision in *Arlington Heights* in part reflected the analysis in Professor Brest's article on legislative motivation wherein he defines analysis of "motivation" as "the inquiry to determine whether impermissible criteria or objectives played a role in the decisionmaking process . . ." Brest, "Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive," 1971 *Sup. Ct. Rev.* 95, 115.

Craig v. Boren, 429 U.S. 190, 198 (1976), about the role of women or "outdated misconceptions concerning the role of females in the home rather than in the 'marketplace and world of ideas.'" *Id.* at 198-199. Proof that a legislature chose a classification that is premised upon or serves the "purpose of fostering 'old notions' of role typing," *id.*, 429 U.S. at 198, is proof of purposeful sex discrimination.⁵⁰ See *Califano v. Goldfarb*, 430 U.S. 199, 211 (1977). The available evidence demonstrates that the legislators were substantially affected by discriminatory stereotypes and traditional ways of thinking about women. As a result, the legislative choice of an extreme and absolute preference was influenced and tainted by unlawful considerations in the form of discriminatory attitudes about women.

A. *The Inference from the Historical Background of the Legislation.*

"The historical background of the decision is one evidentiary source . . .," *Arlington Heights*, 429 U.S. at 267, from which to infer that discriminatory attitudes affected the decisionmaking process.

The absolute veterans' preference was originally enacted in 1896 at a time when legislators, like other members of society, almost certainly presumed that women were inferior to males and had a negligible or subordinate place in the job market. Thus, as this Court has noted:

"[T]hroughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave

⁵⁰ See, e.g., *Weinberger v. Wiesenfeld*, 420 U.S. 636, 644 (1975) ("[T]he framers of the Act legislated on the 'then generally accepted presumption that a man is responsible for the support of his wife and children.'").

codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children. . . . [A]lthough blacks were guaranteed the right to vote in 1870, women were denied even that right — which is itself 'preservative of other basic civil and political rights' — until adoption of the Nineteenth Amendment half a century later."

Frontiero v. Richardson, *supra*, 411 U.S. at 685 (citations omitted). See also *Califano v. Goldfarb*, *supra*, 430 U.S. at 223 (Stevens, J., concurring) (recognizing "the 19th century presumption that females are inferior to males"). An attitude that females were inferior was "expressly recognized in the literature of the 19th century," *Califano v. Goldfarb*, 430 U.S. at 223 n.10 (Stevens, J., concurring), and in its jurisprudence, as reflected by the concurring opinion of Mr. Justice Bradley in *Bradwell v. State*, 83 U.S. (16 Wall.) 130, 141 (1872):

"The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. . . ."

The view that women by virtue of their sex were suited only for certain types of jobs was also clearly reflected in the Massachusetts court decisions of the time. Indeed, in an 1896 opinion, *Brown v. Russell*, 166 Mass. 14, 17 (1896), the Supreme Judicial Court reviewed an early form of preference for veterans and noted:

"When women are to be appointed, there is a satisfactory reason in the nature of the office or employment why this should be done."

There can be no doubt that the decisions of the Commonwealth's 19th century legislators were also affected and influenced by this prevailing attitude of female inferiority when they first considered and adopted the absolute and permanent form of veterans' preference.⁵¹

B. *The Inference from the Legislative and Administrative History.*

An analysis of the legislative and administrative history of the preference also demonstrates that the legislators who enacted and reenacted the absolute and permanent form of preference were strongly influenced by gender-based distinctions and stereotypic assumptions about the role of women.

The first inference that the decisionmaking process was affected by stereotypes about women is provided by examining the specific legislative decisions — the statutes — to ascertain whether gender-related distinctions are expressly set forth in the legislation.⁵² See, e.g., *Hunter v. Erickson*, 393 U.S. 385,

⁵¹ See also Fleming & Shanor, "Veterans' Preference in Public Employment: Unconstitutional Gender Discrimination," 26 *Emory L.J.* 13, 43 (1977) ("It seems probable that most legislators who drafted early extreme veterans' preference statutes, if asked why they could permit the employment discrimination against women which would inevitably result from such a statute, would respond that women belonged in the home and that, like military jobs, upper echelon civil service jobs should be held by men.").

⁵² In order to understand the factors that influenced the legislators, it is necessary to examine the series of actual decisions in the form of specific statutory enactments rather than merely to review the current codification of the general law in Mass. Gen. Laws c. 31.

389 (1969). The present form of absolute preference was first adopted as Chapter 517 of the Acts of 1896. Subsequently, apart from simply expanding the definition of "veteran" or general recodifications, there were two substantive legislative acts reaffirming the choice of an absolute and permanent form of preference: Chapter 150 of the Acts of 1919, and the most recent decision set forth in Chapter 627 of the Acts of 1954. An examination of these statutes reveals explicit distinctions on the basis of gender, which were premised upon and fostered the stereotype that women should occupy only lower-level civil service jobs.

As conceded by the defendants,⁵³ the most recent reaffirmance of the absolute and permanent form of preference, and consequently the legislative act presently depriving the plaintiff and other women in the Commonwealth of access to upper-level civil service positions, is § 5 of Chapter 627 of the Acts of 1954. Mass. St. 1954, c. 627, § 5. This section on its face makes it clear that the legislators intended that men and women were to be treated differently and supports the inference that the legislation was premised upon traditional assumptions about the appropriate types of employment for women. Thus, the section provides that:

"The names of persons who pass examinations for appointment to any position classified under the civil service shall be placed upon the eligible lists in the following order: —

"(1) Disabled veterans as defined in section twenty-three A, in the order of their respective standing; (2) veterans in the order of their respective standing; (3) persons described in section twenty-three B in the order of their respective standing; (4) other applicants in the order of

⁵³ See Brief for the Appellants, p. 24.

their respective standing. *Upon receipt of a requisition not especially calling for women, names shall be certified from such lists according to the method of certification prescribed by the civil service rules applying to civilians.*"

Mass. St. 1954, c. 627, § 5 (emphasis added).

The provision in the statute referring to "a requisition not especially calling for women" is, as the defendants admit, a reference "to special requisition lists classified along lines of gender" which constituted "disparate treatment of similarly situated males and females in the civil service system." Brief for the Appellants, p. 24, n.22. As the district court noted, this policy "operated only to preserve stereotypically 'female' clerical jobs for women." 451 F. Supp. at 148, n.9 (App. 260-261). The statute on its face shows that the legislators knew and intended that the extreme form of preference would freeze out women whenever they competed with men for jobs unless an exception was made to shield them in particular jobs. The fact that the legislators in the very statute that reaffirmed a policy of absolute preference included the policy of segregating certain "female" job classifications demonstrates that they were influenced by the outdated assumption that women would not, or should not, compete with men for most positions.

The 1971 amendment to the preference law accomplished by Mass. St. 1971, c. 219, merely eliminated the mechanism for separate requisitioning for "female" jobs and did not, in any respect, constitute a retroactive nullification of the 1954 and earlier policy decisions⁵⁴ which were influenced by and

⁵⁴ The original statute in 1896 and the substantive reenactment in 1919 also each contained a similar explicit distinction based on sex reflecting the legislators' view of the appropriate jobs for women. The 1896 legislative decision stated: "But nothing herein contained shall be construed to prevent

premised upon the stereotypic assumptions about the appropriate types of jobs for women. While the 1971 legislators removed one obvious sex-discriminatory aspect of the statute designed to "protect" certain jobs for women, they merely struck the offending language without modifying the extreme form of preference which, by its non-neutral structure, inevitably excludes women whenever they compete with men for civil service jobs. Thus, as the district court recognized, the 1971 amendment "did not remove the last vestiges of sex discrimination from the statutory scheme; it only served to make all positions in the civil service subject to the overriding preference formula." *Id.* at 148 n.9 (App. 260).

The policy of separately recruiting and requisitioning on the basis of gender was, in fact and practice, an integral part of the employment practices of the Commonwealth for about 70 years. The legislature continued to authorize the practice in 1965 when it passed Mass. St. 1965, c. 53, which in part provided that examinations to establish a list for appointments could "be restricted either to male persons or to female persons," and which cut back on the practice only on promotional lists. See Mass. Gen. Laws c. 31, § 2A(e), prior to its amendment by Mass. St. 1971, c. 221.

The administrative history also shows that the Commonwealth consistently used the separate requisition system to discriminate against female job seekers and to limit job openings to male applicants. Exhibits 64-79, which are six notices for counsel jobs and ten notices for administrative assistant jobs,

the certification and employment of women." Mass. Acts and Resolves (1896) c. 517, § 2. The 1919 legislative decision stated that the absolute preference would apply "upon receipt of a requisition not especially calling for women . . ." Mass. Gen. Acts (1919) c. 150, § 2.

demonstrate this practice: each expressly invites only "male" candidates to take the examination.⁵⁵

As this Court noted in *Keyes v. School District No. 1, Denver, Colo.*, 413 U.S. 189, 207-208 (1973), "a finding of illicit intent as to a meaningful portion of the item under consideration has substantial probative value on the question of illicit intent as to the remainder." Applying this principle to the present case, the fact that the recruiting and requisitioning policy and practice of the Commonwealth for approximately 70 years indisputably was based on intentional sex discrimination provides the strong inference that the extreme absolute preference policy was based on similar impermissible gender-related considerations.⁵⁶

Furthermore, as this Court has also noted, a "series of official actions," see *Arlington Heights, supra*, 429 U.S. at 267, based on gender-related distinctions can raise an inference of ongoing discriminatory intent:

"This is merely an application of the well-settled evidentiary principle that 'the prior doing of other similar acts, whether clearly a part of a scheme or not, is useful as re-

⁵⁵For example, the 1961 notice of examination for an Administrative Assistant position, Exhibit 67, stated: "Vacancies: From time to time, for males." The 1961 notice for a Head Administrative Assistant position, Exhibit 66, stated: "Vacancies: At present there is one vacancy for a male . . ." A 1963 notice for a Tax Counsel and a 1962 notice for a position as Attorney, Exhibits 64 and 65, each stated: "At present there is one vacancy for a male, to be filled on a permanent basis."

⁵⁶As this Court explained in *Keyes*:

". . . [T]here is high probability that where school authorities have effectuated an intentionally segregative policy in a meaningful portion of the school system, similar impermissible considerations have motivated their actions in other areas of the system." 413 U.S. at 208.

ducing the possibility that the act in question was done with innocent intent.'"

Keyes v. School District No. 1, Denver, Colo., 413 U.S. at 207 (quoting 2 J. Wigmore, *Evidence* 200 (3d ed. 1940)).⁵⁷

In the present case, the evidence showed that legislature after legislature continued to authorize the practice of sex-specific recruiting and requisitioning. See, e.g., Mass. St. 1896, c. 517; Mass. St. 1919, c. 150, § 2; Mass. St. 1945, c. 725, § 2(e); Mass. St. 1954, c. 627, § 5; Mass. St. 1965, c. 53. These distinctions by sex were also reflected in the rules and reports of the Civil Service Commission which in early years spoke only in terms of "clerical positions" for women.⁵⁸ See *supra*, pp. 16-19. Year after year, for job after job, the Division of Civil Service recruited and requisitioned based on vacancies in "male" jobs and vacancies in "female" jobs. See, e.g., Exhibits 64-79.

Moreover, when this action began in 1975, civil service law reflected other express sex-related distinctions. For example, Mass. Gen. Laws c. 31, § 23B, as amended by St. 1974, c. 835, § 109, provided for an absolute civil service preference to "the

⁵⁷ Sometimes this principle is referred to as the "*Keyes* presumption of continuity of intent within an institution." Note, "Reading the Mind of the School Board: Segregative Intent and the De Facto/De Jure Distinction," 86 *Yale L. J.* 317, n.19 (1976).

⁵⁸ As recently as 1972, the Civil Service Rules contained gender discrimination. See, e.g., Rule 6, Rules of the Civil Service, which stated:

"A male applicant for all other positions of inspector in the Department of Public Safety shall have reached his twenty-fifth birthday and shall not have reached his fiftieth birthday on the date of examination"

Division of Civil Service, Civil Service Laws and Rules, Form 345, 5 M-1-73-075231, at 84.

widow or widowed mother of a veteran," which was premised on the assumption that women are dependent on men. Mass. Gen. Laws c. 31, § 24, amended in 1974 and in 1975, permitted special requisitions for "young and vigorous men" to the labor service until 1977 when "men" was changed to "persons" by Mass. St. 1977, c. 815, § 2. Mass. Gen. Laws c. 31, § 5, exempted "male school traffic supervisors" from the provisions of the civil service laws, while keeping female school traffic supervisors under the civil service system.

Thus, the specific statutes enacting the extreme preference policy, the interrelated and undisputed sex-discriminatory recruiting and requisitioning policy and practices, and the consistency of intent evinced by the long history of related gender-based decisions, all provide the strong inference that the legislative decisionmakers who adopted and reenacted the extreme form of absolute and permanent preference were substantially affected by impermissible discriminatory assumptions and attitudes about the role of women in society.

C. *The Inference from the Fact that the Massachusetts General Court has Consistently been Dominated by Male Legislators.*

The simple fact that the decisionmaking bodies that originally adopted and subsequently reenacted an absolute and permanent form of preference have been overwhelmingly dominated by males indicates that, insofar as the interests of women were even considered, perceptions concerning their appropriate employment status were based on archaic generalizations about them. The Commonwealth's legislature — the General Court — from 1883 through 1974 has been virtually an all-male group.⁵⁹ Indeed, no woman was in the

⁵⁹ The General Court consisted of a House of Representatives with 240 members and a Senate with 40 members, during the period from 1883

legislature in 1896 when the absolute form of preference was originally adopted or during the first major reenactment of this policy in 1919. During the 1954 legislative session when the absolute form of preference was most recently reenacted, only seven women were among the 280 elected members.

When, as here, a particular group dominates the decision-making process, an inference that that group will favor its own interests is fairly raised. Indeed, the "classic situation in which a 'minority group' may suffer discrimination in a community is where it is 'relegated to . . . a position of political powerlessness.'" *Castaneda v. Partida*, 430 U.S. 482, 515, n.6 (1977) (Powell, J., dissenting and quoting from *San Antonio School District v. Rodriguez*, 411 U.S. 1, 28 (1973)). Male legislators, like all males, have also been subjected to the "socialization process of a male-dominated culture." *Kahn v. Shevin*, 416 U.S. 351, 353 (1974). Since the legislature has undergone little change and has remained a predominantly male club, the fair inference is that its members have continued to be influenced by outmoded stereotypic perceptions of women. See *Hazelwood School Dist. v. United States*, 433 U.S. 299, 309, n.15 (1977), and cases cited therein; Fed. Rule Evid. 406.

through 1974. The members were elected every two years. For each two years, the Commonwealth has published a *Manual for the Use of the General Court* (each odd numbered year), Boston, Massachusetts, which shows that there were no women in the General Court until the 1923-1924 sessions and, through 1974, there were never more than 10 female legislators among the 280 members.

III. THE DEFENDANTS FAILED TO REBUT THE FINDING THAT THE COMMONWEALTH'S CHOICE OF AN ABSOLUTE AND PERMANENT FORM OF PREFERENCE CONSTITUTES AN INTENTIONAL AND PURPOSEFUL DISCRIMINATION AGAINST WOMEN.

Once the plaintiff demonstrated that the absolute and permanent form of veterans' preference adopted by the Commonwealth intentionally discriminated against women, the defendants had the opportunity⁶⁰ to rebut this conclusion in either of two ways. First, the defendants could have attempted to show that discriminatory factors did not affect the Commonwealth's choice of this form of preference. Alternatively, they could have tried to show that the Commonwealth had undertaken such significant efforts toward increased employment opportunity for women that discrimination may either be presumed not to have existed or, assuming the absolute preference did discriminate against women, that such efforts, as a practical matter, compensated for and, thus, "cured" the exclusionary effects of the preference. The defendants, however, misunderstood the first alternative and, in any event, offered no substantial evidence as to either.

A. *The Defendants Misstate the Nature of the Proof Necessary to Rebut a Determination of Intentional Discrimination.*

As the district court concluded, the evidence offered by the plaintiff proved an intentional discrimination against women

⁶⁰The suggestion in the Brief for the United States as *Amicus Curiae*, pp. 40-41, that the Commonwealth should be given another chance to rebut the proof of intentional discrimination ignores the fact that, upon remand from this Court, the district court provided defendants the opportunity to present additional evidence. As the district court noted, the defendants represented at oral argument that they did not desire to offer any such additional evidence. 451 F. Supp. at 148 n.12 (App. 262).

which shifted the burden to the Commonwealth to show that the same exclusionary preference formula would have been adopted in any event. 451 F. Supp. at 148 n.11 (App. 262); *Arlington Heights v. Metropolitan Housing Corp.*, *supra*, 429 U.S. at 271 n.21. The defendants erroneously articulate this burden, as did the dissenting district court judge,⁶¹ in terms of whether the General Court would have enacted an absolute and permanent form of preference if more women had been allowed into the military services. Brief for the Appellants, p. 49. However, this question is not the appropriate inquiry. While, as the defendants point out, the Commonwealth is largely not responsible for the discrimination against women by the military,⁶² Brief for the Appellants, p. 35, the Commonwealth's choice of the form of preference that operates to exclude women must be analyzed in light of the unalterable fact that the military *did* discriminate and women were not allowed to become veterans. Thus, the proper inquiry is whether the Commonwealth would have chosen the absolute and permanent form of preference and its inevitable exclusionary consequences, if the legislators had not been affected by the archaic stereotypic assumptions about women and their appropriate role in the working world.

The defendants offered no proof that, absent the discriminatory attitudes about women which tainted the decision-making process, the legislature would have chosen a form of preference which systematically and inevitably excludes women from upper-level jobs. Instead, the defendants simply offer the argument that the ultimate goal of the veterans' pref-

⁶¹ Judge Murray framed the question as follows: "... Would the veterans' preference statute have been enacted if women were represented in the armed services in such numbers that the preference would have no discriminatory effect?" 451 F. Supp. at 156 (App. 279).

⁶² *But see*, note 41, *supra*.

erence statute is to reward veterans. Especially where, as here, there appears a long history of related and overt discrimination (*e.g.*, the use of separate requisitions for "female" jobs), the defendants properly are held to a burden of producing "clear and convincing evidence," *Keyes v. School District No. 1, Denver, Colo.*, *supra*, 413 U.S. at 209, to rebut the finding of discriminatory intent. This burden is no more satisfied in this case by the defendants' claims that the ultimate purpose of the preference statute is legitimate, than it is in school desegregation cases in which defendants often claim, for example, that the ultimate purpose of certain student assignment policies (maintaining neighborhood schools) that result in segregated schools is legitimate. Indeed, the burden is far more substantial:

"In discharging that burden, it is not enough, of course, that the school authorities rely upon some allegedly logical, racially neutral explanation for their actions. Their burden is to adduce proof sufficient to support a finding that segregative intent was not among the factors that motivated their actions."

Keyes v. School District No. 1, Denver, Colo., *supra*, 413 U.S. at 210.

In order to rebut the proof that the Commonwealth deliberately and intentionally sacrificed "the career opportunities of its women in order to benefit veterans," 451 F. Supp. at 150 (App. 265), the defendants would have had to show that the members of the General Court in choosing the absolute and permanent form of preference were unaffected by archaic stereotypes about women and traditional perceptions of women in the workforce, and, thus, that such inherently discriminatory attitudes were not a determinative factor in

adopting an extreme form of preference. The defendants made no such showing. Their failure to do so confirms the well-supported conclusion that the legislature's choice of an absolute and permanent form of preference was in substantial part caused by a discriminatory view of women and that the legislature's decision, as the district court concluded, "resulted from improper evaluation of competing considerations." 451 F. Supp. at 150 (App. 265).

B. The Defendants Presented No Persuasive Proof of Any "Affirmative Action" that Rebutted the Finding of an Intentional and Purposeful Discrimination.

In *Washington v. Davis*, *supra*, this Court relied in part on collateral circumstances — proof of effective affirmative steps by the District of Columbia police force to recruit minorities — to conclude that the writing test did not constitute an intentional or purposeful discrimination against minorities. The district court in this case looked for proof of such affirmative efforts by the Commonwealth toward women and found none:

"Unlike the defendants in *Davis*, the Commonwealth has not made any showing of affirmative efforts to recruit women, or of a recent rise in the percentage of women appointed to competitive civil service positions.

"While the officials in *Davis* sought 'systematically' to recruit minorities who had passed the preemployment test, the defendants here have demonstrated no attempt to mitigate the permanent and absolute impact on women of a formula that systematically excludes them

from desirable public service positions even though they have demonstrated their qualifications . . ."

451 F. Supp. at 149 (App. 263-264).

In the face of the district court's clear statement of the defendants' failure to prove efforts to recruit and hire women into upper-level positions, the defendants nonetheless assert that the "employment practices" of the state "demonstrate a pattern and practice of affirmative state action designed to guarantee equal employment opportunities for women." Brief for the Appellants, p. 50.

However, a review of the asserted "employment practices" reveals no recruitment of or other meaningful affirmative action as to women. Rather, they are only cosmetic statutory revisions that belatedly eliminated some of the more blatant sex discrimination in the civil service system or statements of general policy which, in and of themselves, do not prove that any concrete steps have been taken to ameliorate the "near blanket, permanent exclusion of all women from a major sector of employment," 415 F. Supp. at 501 (App. 226) (Campbell, J., concurring).

First, defendants implicitly admit that, for over 70 years, the Commonwealth operated a civil service system based on sex-specific requisitions for jobs, Brief for the Appellants, p. 49, and that there were numerous "gender-based distinctions in the civil service law," Brief for the Appellants, p. 49 n.37. However, they argue that the repeal in 1971 of such blatantly discriminatory aspects of the law constitutes proof of "action designed to guarantee equal employment opportunities for women." Brief for the Appellants, p. 50. The legislature's repeal of the statutory authorization for gender-specific requisitioning does not prove that the related sex discrimination embodied in the absolute form of preference is not

purposeful. Nor does it demonstrate that women are, in fact, being provided any increased opportunity for upper-level positions. Indeed, the district court correctly noted the speciousness of defendants' argument:

"Contrary to defendants' assertion, elimination of this exception [which provided that the preference would not apply to requisitions for 'female' jobs] did not remove the last vestiges of sex discrimination from the statutory scheme; it only served to make all positions in the civil service subject to the overriding preference formula."

451 F. Supp. at 148 n.9 (App. 260).

Second, the defendants assert that the Commonwealth's ratification of the federal Equal Rights Amendment, its adoption of a similar amendment to its constitution, and a general statement by the Governor encouraging affirmative action in public employment indicate increased opportunity for women and, thus, demonstrate a lack of discriminatory intent on the part of the Commonwealth. Brief for the Appellants, pp. 49-50. However, broad statements of policy cannot nullify deliberate acts of discrimination against women, particularly when such declarations of good faith are made long after the discriminatory decisions.⁶³ Nor do general policy statements show that, in fact, any substantive affirmative action has been undertaken. The defendants have not offered, nor can they point to, any statistics or specific actions by the Commonwealth that demonstrate that any woman can now avoid the inevitable exclusionary effects of the extreme statutory

⁶³The defendants' argument, taken to its logical conclusion, would mean that no state statute could ever be held to violate the Equal Protection Clause so long as the state had also adopted a broad statement of policy providing that discrimination was unlawful.

preference. Deservedly, declarations of a general purpose or policy not to discriminate have been given little probative weight against specific actions and policies of purposeful and intentional discrimination. See, e.g., *Alexander v. Louisiana*, 405 U.S. 625, 632 (1972); *Hernandez v. Texas*, 347 U.S. 475, 481 (1954). The defendants' general assertions of affirmative action, falling well within this category, are of no probative value in rebutting the finding of purposeful sex discrimination.

C. *The Defendants Equate the Ultimate Goal of the Statute with Intent.*

As in the district court, the defendants point to the ultimate goal of the statute — an attempt to aid veterans — and argue that its legitimacy necessarily is conclusive as to whether the adoption of the absolute preference constitutes intentional and purposeful discrimination against women. Brief for the Appellants, p. 40; see also Brief for the United States as *Amicus Curiae*, pp. 31-32.

This argument is erroneous because it equates the "ultimate" or "dominant" purpose of an act with all of its intended consequences. Defendants blur the appropriate distinctions by implying that this Court uses the words "intent," "motive" and "purpose" interchangeably regardless of the context. Brief for the Appellants, p. 40; see also Brief for the United States as *Amicus Curiae*, p. 27. This is simply not true, and in any event, it cannot allow the defendants to avoid the conclusion that those consequences to women that the legislature deliberately accepted in the decisionmaking process were just as "intended" as the principal purpose or ultimate goal of the statute.

However, a legitimate untimate objective to aid veterans does not absolve the legislature of responsibility for the in-

evitable consequences to women that stem from its choice of the particular means — an absolute and permanent preference — by which it seeks to accomplish its goal. Defendants merely ignore those cases in which this Court, while recognizing the legitimacy of the ultimate governmental objective, nevertheless found that the choice of a particular means to achieve the objective constituted an intentional discrimination against women.

Thus, in *Reed v. Reed*, 404 U.S. 71, 76 (1971), the Court found the ultimate objective to reduce the workload on probate courts legitimate but, nonetheless, determined that the chosen means constituted a sufficiently intentional discrimination against women to be unconstitutional. Similarly, in *Califano v. Goldfarb*, 430 U.S. 199 (1977), the Court recognized that the primary purpose for the challenged statute was the legitimate desire to provide for needy families. This fact did not deter the Court from analyzing the classification itself which on its face appeared only to discriminate against men (widowers). On analysis, the Court found an intentional and purposeful discrimination against women because the classification inevitably penalized female workers and was premised upon and fostered the stereotype that women are less likely to be the primary source of support for a family. So too, in other contexts, the principal “legitimate” objective or desire of the legislature has not precluded analysis of the intended consequences that flow from the chosen means of achieving the ultimate objective. See, e.g., *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 173 (1972), where the legitimate objective of protecting the family unit did not shield the state from a review of the intentional consequences to illegitimate children that stemmed from the adopted classification.

The ultimate purpose of the preference statute is to aid veterans. The particular state action to achieve the purpose

— adoption of an absolute and permanent preference — inevitably excludes women from the classified official service. The legitimate, indeed benign, nature of the Commonwealth’s goal does not render the preference’s effects upon women anything less than deliberate and purposeful. As this Court has noted in a somewhat different context:

“The Equal Protection Clause would be a sterile promise if state involvement . . . could be shielded altogether from constitutional scrutiny simply because its ultimate end was not discrimination but some higher goal.”

Norwood v. Harrison, 413 U.S. 455, 466-467 (1973).

IV. THE DISTRICT COURT PROPERLY INVOKED AND APPLIED THE STANDARD OF REVIEW FOR STATUTES THAT DISCRIMINATE AGAINST WOMEN.

The foregoing analysis clearly establishes that the adoption and use of the absolute veterans’ preference formula discriminates against women,⁶⁴ denying them meaningful employment opportunity in a major sector of the state’s economy by

⁶⁴The defendants’ reliance on cases involving challenges by male non-veterans to various types of veterans’ preferences therefore is misplaced. See Brief for the Appellants, p. 52, and cases cited therein. In none of these cases did the Court consider whether the veterans’ preference discriminated against women. In *Koelfgen v. Jackson*, 355 F. Supp. 243 (D. Minn. 1972), some of the plaintiffs were females who sought to represent a class of women who were injured by the veterans’ preference. See *id.* at 247 n.3. However, the court certified only a class of “non-veterans” and applied a rational basis test without any discussion of claims unique to the female plaintiffs. *Id.* at 248, 251. The district court in this case properly distinguished these cases in rejecting a “rational basis” test. See 415 F. Supp. at 496-497 n.11 (App. 214).

excluding them from all civil service positions for which they must compete with a substantial number of men. This exclusion perpetuates and reinforces the very type of outdated assumptions about sexual roles that the Constitution proscribes and that Massachusetts observed during the course of 70 years of single-sex requisitions. Cf. *Stanton v. Stanton*, 421 U.S. 7, 15 (1975). Women are effectively barred from positions which are traditionally "male jobs," including the upper-level positions which are the most desirable in state service. "Few, if any, females have ever been considered for the higher positions in the state Civil Service." 415 F. Supp. at 498 (App. 218). The jobs which are available to women are those shunned by men: the lower-paying, lower-grade positions, such as clerk and secretary, for which men traditionally have not applied. The statute thus operates to maintain patterns of occupational sex segregation based on traditional male and female roles.⁶⁵ Moreover, as discussed above, the discrimination is rooted in legislative assumptions that such roles were entirely appropriate. See pp. 37-48, *supra*.

Such statutes "have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members," *Frontiero v. Richardson*, *supra*, 411 U.S. at 687, and are likely to burden women to a greater extent than is necessary to achieve the statutory purpose. In balancing the costs and benefits of various

⁶⁵"Role-typing" is further reinforced by the statute because "[l]imited employment opportunities, in turn, discourage long-term work force participation and encourage dependency upon male relatives." Blumberg, "De Facto and De Jure Sex Discrimination Under the Equal Protection Clause: A Reconsideration of Veterans' Preference in Public Employment," 26 *Buffalo L. Rev.* 1, 54 (1977). Thus, by perpetuating these outdated stereotypes, the veterans' preference statute effects a self-fulfilling prophecy. See, e.g., L. Tribe, *American Constitutional Law* 1065 (1978); "The Supreme Court, 1974 Term," 89 *Harv. L. Rev.* 47, 100 (1975).

means of effecting the legislative objective, a legislature that operates under these archaic assumptions about women is likely to underestimate the harm to women which will result from the statute. See G. Blumberg, "De Facto and De Jure Sex Discrimination Under the Equal Protection Clause: A Reconsideration of the Veterans' Preference in Public Employment," 26 *Buffalo L. Rev.* 1, 38-39, 53 (1977).

Gender-based discrimination of this nature can withstand the judicial scrutiny required by the Equal Protection Clause only if it is found to "serve important governmental objectives" and to be "substantially related to the achievement of those objectives." *Craig v. Boren*, 429 U.S. 190, 197 (1976); *Califano v. Goldfarb*, 430 U.S. 199, 210 (1977); see "The Supreme Court, 1976 Term," 91 *Harv. L. Rev.* 70, 177 (1977). Although this standard of review was formulated in cases involving explicit gender discrimination, its application here is nonetheless appropriate. As noted above, see pp. 26-31, *supra*, the veterans' preference statute is only superficially neutral with respect to women. Because the veterans' preference formula effectively replaces testing as the criterion for determining who will be hired, 415 F. Supp. at 488-489 (App. 198), the statute adopts for all practical purposes the military's *de jure* discrimination against women. Moreover, it reflects and perpetuates the sex-role stereotypes and assumptions that have been rejected in the previous decisions of this Court. See, e.g., *Califano v. Goldfarb*, *supra*, 430 U.S. at 206-207, 210-211, 217; *Craig v. Boren*, *supra*, 429 U.S. at 198-199; *Stanton v. Stanton*, *supra*, 421 U.S. at 14; *Weinberger v. Wiesenfeld*, *supra*, 420 U.S. at 645. See generally pp. 37-48, *supra*. Furthermore, the operation of the veterans' preference formula works a wholesale denial of public employment opportunities for women. Although the right to public employment is not a "fundamental interest," this Court has specifically disapproved classifications which restrict the employment opportunities "of an entire class of qualified individuals,

Hampton v. Mow Sun Wong, 426 U.S. 88 (1976), and has expressed particular concern for women, who have "historically suffered discrimination in employment." *Frontiero v. Richardson*, 411 U.S. 677, 689 n.23 (1973); see *Kahn v. Shevin*, *supra*, 416 U.S. at 353.

Finally, "heightened scrutiny" is appropriate for statutes that impose a legal burden on an entire class of persons without regard to individual merit or responsibility. See, e.g., *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972). Such a burden is particularly invidious because it departs from the "deeply rooted" principle that individuals should be treated on the basis of "individual merit or achievement, or at the least on factors within the control of an individual." *Board of Regents of California v. Bakke*, ___ U.S. ___, ___, 98 S. Ct. 2733, 2785 (1978) (Brennan, J., concurring and dissenting); accord, *Weber v. Aetna Casualty & Surety Co.*, *supra*. The devastating burden which the absolute veterans' preference statute imposes on women is, of course, completely unrelated to individual merit or responsibility. As the district court found, the veterans' preference formula excludes women from upper-level civil service positions "because of circumstances totally beyond their control," see 415 F. Supp. at 499 (App. 220), and despite their individual qualifications. *Id.* at 498-499 (App. 219).

The veterans' preference statute can withstand constitutional challenge only if it is substantially related to and in fact closely serves important government objectives. See, e.g., *Califano v. Webster*, 430 U.S. 313, 317 (1977); *Weinberger v. Wiesenfeld*, *supra*, 420 U.S. at 648 and n.16. Thus, a two-step analysis is required. First, it is necessary to examine the objectives of the statute. Some objectives are constitutionally insufficient to justify gender-based discrimination. See, e.g., *Califano v. Goldfarb*, *supra*, 430 U.S. at 211 n.9. It is then necessary to determine whether the particular means chosen

by the state to achieve its objectives in fact "closely serves" those objectives. *Craig v. Boren*, *supra*, 429 U.S. at 200; see "The Supreme Court, 1976 Term," *supra*, 91 *Harv. L. Rev.* at 184. The "crucial question" is whether the statute advances the legislative objective "in a manner consistent with the command of the Equal Protection Clause," see *Reed v. Reed*, *supra*, 404 U.S. at 76, or whether it has "an unduly tenuous 'fit'" with the legislative goal, see *Craig v. Boren*, *supra*, 429 U.S. at 202. As the district court properly observed:

"It is not enough that the prime objective of the Veterans' Preference statute . . . is legitimate and rational. The means chosen by the state to achieve this objective must also be legitimate and rational."

415 F. Supp. at 497 (App. 216).

Massachusetts asserts three interests in its attempt to justify the drastic employment preference that it has adopted: (1) assisting veterans in their readjustment to civilian life; (2) encouraging enlistment; and (3) rewarding veterans for their past service to the country. See Brief for the Appellants, p. 24. While the legitimacy of some form of assistance to veterans has long been recognized, the inquiry compelled by this Court's decisions does not end there. Careful analysis of these interests reveals that the statute simply does not serve to achieve the goals of assisting readjustment or encouraging enlistment, and that there is no convincing reason for the adoption of the absolute preference as a reward to veterans.

The state places primary emphasis on its interest in assisting veterans in their readjustment to civilian life, stressing the high unemployment rate for younger veterans, and particularly for younger minority veterans. Brief for the Appellants, p. 27. This solicitude has a hollow ring when measured

against the statute. The Massachusetts preference is permanent: an eligible veteran may use the preference repeatedly, throughout his lifetime, without regard to the date of his discharge from the armed services. The benefits of the statute are therefore available to veterans who were discharged from the military as long as 39 years ago and who clearly need no assistance in readjusting to civilian life.⁶⁶ But the Massachusetts preference does little for the recently-discharged veteran, especially in view of the limited number of civil service positions available. Because the statute creates a permanent preference, its principal beneficiaries are not recently discharged veterans but those who left the service ten or more years ago and whose greater experience will earn them higher examination scores than their younger counterparts.⁶⁷

Moreover, the preference provides no benefits whatsoever to veterans whose skills are unsuited to the civilian job market, because it benefits only veterans who take and pass a qualifying examination. Thus, the statute provides no benefits to those veterans who would seem to be most in need of rehabilitation or readjustment assistance. Cf. *Hicklin v. Orbeck*, ___ U.S. ___, ___, 98 S. Ct. 2482, 2488-2489 (1978) (preference for "qualified" state residents not substantially related to goal of reducing unemployment).

The second asserted interest, that of encouraging enlistment in the armed services, is simply not an adequate justification for a state to exclude women from significant public employ-

⁶⁶For example, the eligibility lists for the positions which Helen Feeney sought included 95 veterans for whom information concerning military discharge is available. Of these 95 veterans, 43 were discharged in the 1940s and 21 were discharged in the 1950s. (App. 106, 150-151, 169-170).

⁶⁷This is dramatically illustrated by the Administrative Assistant list. Sixty-four veterans passed the examination, of whom 20 were discharged within five years of the establishment of the list (App. 150-151). Of that number, only four were ranked among the first 34 on the list.

ment opportunities. Responsibility for raising an army belongs to the federal government, U.S. Constitution, Art. I, § 8, see *Johnson v. Robison*, 415 U.S. 361 (1974), and not to the state. Cf. *Nyquist v. Mauclet*, 432 U.S. 1 (1977). Second, it is improbable that the goal of encouraging enlistment was in fact one of the "actual purposes" of the statute, *Califano v. Goldfarb*, *supra*, 430 U.S. at 212, *Weinberger v. Wiesenfeld*, *supra*, 420 U.S. at 648, because the legislature has invariably extended the preference to veterans of a particular war only after that war has ended. The statute was first enacted in 1896 and extended a preference to Civil War veterans who had served more than thirty years earlier. The statute has since been amended a number of times but always to enlarge the class of eligible veterans on a retroactive basis. It is therefore wholly unlikely that the legislative objective was to encourage individuals to enlist. Third, the veterans' preference statute has no rational nexus to the goal of encouraging enlistments. There is no "convincing *factual* rationale" which suggests that such retroactive grants serve as an inducement for individuals to enlist. The defendants have adduced absolutely no evidence to suggest that even one individual ever enlisted in the armed forces because of the possibility that he might eventually be eligible for a civil service preference.

The final interest asserted by the state is that of rewarding veterans for their past service. Although this is a legitimate goal, it is unclear that it is an interest which can justify severe and pervasive discrimination against women. See *Califano v. Goldfarb*, *supra*, 430 U.S. at 211 n.9 ("justifications that suffice for nongender-based classifications . . . do not necessarily justify gender discriminations"). The district court concluded that it was not.

In assessing whether the proffered objective of rewarding veterans justified an absolute preference, the district court quite appropriately considered whether there were less drastic

alternatives which could effectively achieve that purpose. The decisions of this Court establish that the heightened scrutiny appropriate in gender discrimination cases includes consideration of the means chosen by the state to advance its stated goals. *Craig v. Boren, supra*; *Califano v. Goldfarb, supra*. The existence of less restrictive alternatives is relevant to whether the chosen legislative means is "substantially related" to the governmental objective and to whether the governmental objective is sufficiently important to justify the adverse impact of the particular means adopted by the state. See "The Supreme Court, 1976 Term," *supra*, 91 *Harv. L. Rev.* at 187. Thus, the Court has rejected legislative classifications under this heightened standard of review because of their "unduly tenuous 'fit'" with legislative purposes, *Craig v. Boren, supra*, 429 U.S. at 202, and has required that such classifications be "carefully tuned to alternative considerations." *Trimble v. Gordon*, 430 U.S. 762, 772 (1977); *Mathews v. Lucas*, 427 U.S. 495 (1976). See also, *Hicklin v. Orbeck, supra*; cf. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975) (under Title VII of the Civil Rights Act of 1964, a discriminatory selection criterion is unlawful, even if job-related, if there are other, less discriminatory selection devices that also serve an employer's legitimate interests).

The required "fit" is lacking in this case. It is, in the words of the district court, a "broad brush approach" of the grossest sort to the end of rewarding veterans for their past service. It accords a lifetime absolute employment preference to virtually every veteran who has served 90 days in the armed services in any capacity, at least one day of which was during the thirty-five years between 1940 and 1975.⁶⁸ Moreover, as a means of rewarding veterans, the absolute preference is perhaps one of

⁶⁸ 180 days of service is required for veterans of one particular era. See note, 9, *supra*.

the least efficient choices available. Only a small portion of the nearly 900,000 veterans who reside in Massachusetts have used or will use the preference.

As the district court found, "there are alternatives available to the state to achieve its purpose of aiding veterans, without doing so at the singular expense of another identifiable class, its women." 415 F. Supp. at 499 (App. 219); *accord*, 451 F. Supp. at 150 (App. 265). In the area of public employment, veterans can be rewarded by means of a "point preference" such as the federal government and most states extend to veterans, or by means of a preference for a limited period of time.⁶⁹ Such limited preferences reward veterans but do not inescapably exclude the most highly qualified women from upper-level civil service positions. See 415 F. Supp. at 499 (App. 219-220); 451 F. Supp. at 151 (App. 268-269) (Campbell, J., concurring).⁷⁰ Contrary to the suggestion of the defendants,

⁶⁹ In fact, while most states and the federal government give veterans some limited preference in public employment, only four states employ a preference comparable in scope to Massachusetts' absolute and permanent preference. See 51 Pa. Cons. Stat. Ann. § 7104 (Purdon 1976); S.D. Compiled Laws Ann. § 3-3-1 (1974); Utah Code Ann. § 34-30-11 (1974); Vt. Stat. Ann. Act 20 p. 1543 (1968). See generally, Fleming & Shanor, "Veterans' Preference in Public Employment: Unconstitutional Gender Discrimination?", 26 *Emory L.J.* 13, 16-20 (1977).

⁷⁰ The defendants observe that, in Massachusetts, women obtained approximately 43 % of the appointments to official service positions during the period from 1963-1973, whereas women held only 32.3 % of the positions in the federal civil service. See Brief for the Appellants, pp. 54-55. However, the objection to the absolute preference is not that it excludes women from all positions, but rather that the statute excludes them from upper-level positions.

Moreover, the 43 % figure is misleading in a number of respects. First, it ignores that 56 % of the persons certified as eligible for permanent employment during the period were women. The defendants urge that the 43 % figure should be compared to the proportion of women in the workforce in Massachusetts (said to be approximately 40 %). Obviously, however, a comparison of the appointment rate to the workforce at large is not as mean-

see Brief for the Appellants, pp. 54-56, women would have fared considerably better on the 50 eligible lists in the record, Exs. 13-62, under a "five/ten" point preference system similar to the federal statute⁷¹ than they did under Massachusetts' absolute preference. On 22 lists on which women were totally absent from the top three positions⁷² under an absolute preference, they would have ranked in one or more of such places under a five/ten point preference. On 10 additional lists, women would have received higher rankings under a five/ten point preference than under an absolute preference.⁷³ *Id.*

Wholly apart from public employment, there are numerous ways in which the state can reward veterans without directly and unduly burdening women. For example, Massachusetts can and does extend monetary benefits to veterans: mustering-out bonuses, *see, e.g.*, Acts of 1973, c. 692; tax abate-

ingful as a comparison to the actual pool of qualified applicants available for appointment. *Hazelwood School District v. United States*, 433 U.S. 299, 308 n.13 (1977). Second, the 43 % figure does not reveal the proportion of civil service appointments which women would have obtained but for the veterans' preference.

⁷¹ Under a "five/ten" point preference, five points are added to the civil service examination scores of most veterans; ten points are added to the scores of disabled veterans.

⁷² As noted above, attainment of one of the top three positions on an eligible list ensures an applicant that he or she will be among the first considered for a vacancy.

⁷³ On seven of those 10 lists, the application of a five/ten point preference also would have resulted in an increased number of women among the top three positions. Moreover, on 20 lists, application of a five/ten point preference would have resulted in the same ranking of the top three applicants as a pure "merit" ranking. For example, in the list for a Day Care Development Specialist, Ex. 28, the top three examination scores were received by three female non-veterans: 86.02, 83.80 and 83.52. Under the absolute preference, these women were displaced by three non-disabled male veterans with scores of 76.34, 75.40 and 70.96. Under a five/ten point preference, by contrast, the three women would have continued to occupy the top three places on the list.

ments, *see, e.g.*, Mass. G.L. c. 59, § 5; educational benefits, *see, e.g.*, Mass. G.L. c. 69, §§ 7, 7A, 7B, 7F; burial benefits, *see, e.g.*, Mass. G.L. c. 115; special programs for needy veterans, *see, e.g.*, Mass. G.L. c. 115, c. 115A. *See generally* Blumberg, "De Facto and De Jure Sex Discrimination," *supra*, 26 *Buffalo L. Rev.* at 67-68.

Unlike these and similar statutes that distribute across the public generally the cost of benefits for veterans, the permanent, absolute preference in public employment exacts a devastating toll from a particular group — women seeking public employment — who have long been the victims of pervasive discrimination in the job market and who, "because of circumstances totally beyond their control, have little if any chance of becoming members of the preferred class." 415 F. Supp. at 499 (App. 220-221). *See* Blumberg, "De Facto and De Jure Sex Discrimination," *supra*, 26 *Buffalo L. Rev.* at 9, 71-73. As this Court has observed, it is particularly invidious to impose on a discrete class of individuals a legal burden which has no substantial relationship to their individual responsibility. *See Weber v. Aetna Casualty & Surety Co.*, *supra*, 406 U.S. at 175.

Thus, the district court properly concluded that the choice of an extreme veterans' preference, in light of the destructive effect on women's employment opportunities and the availability of less discriminatory means for rewarding veterans, violated the Equal Protection Clause.

Conclusion.

For the reasons stated above, the judgment and order of the district court should be affirmed.

Respectfully submitted,

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No. 78-233

Supreme Court, U. S.

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In the Supreme Court of the United States

OCTOBER TERM, 1978

PERSONNEL ADMINISTRATOR OF MASSACHUSETTS,
ET AL., APPELLANTS

v.

HELEN B. FEENEY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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In the Supreme Court of the United States

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PERSONNEL ADMINISTRATOR OF MASSACHUSETTS,
ET AL., APPELLANTS

v.

HELEN B. FEENEY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

QUESTION PRESENTED

Whether a Massachusetts statute that provides a preference for veterans over non-veterans in the selection of state civil service employees discriminates against women in violation of the Equal Protection Clause.

INTEREST OF THE UNITED STATES

Veterans' preferences have long been a feature of public employment. They need not, however, take a single form. The Massachusetts preference at issue here is an "absolute" preference. The federal pref-

erence has never applied in such an absolute way to such a large proportion of public employees as does that of Massachusetts. Moreover, President Carter has asked Congress to alter the federal veterans' employment preference because, among other things, it unduly interferes with employment opportunities for women and with management flexibility. The President's proposed changes would reduce the duration of the federal preference and the amount of the preference in several ways.¹

But the existing federal laws still provide a significant preference to veterans, and federal law would continue to do so under the President's proposed changes. The Court's constitutional analysis of the Massachusetts program may affect the federal program—as it exists or as it may be modified—in spite of the differences between the two. The Court's analysis could affect other veterans' programs as well.

¹ The President's original proposal would have made the preference available to veterans for only 10 years after their separation from the military (three years in the case of retired members of the armed forces) or until appointment to a permanent civil service position, whichever came first. Veterans' retention rights in the case of a reduction in force would have been limited to a period of three years following the veteran's appointment to a civil service position, although veterans would have received a permanent five years' seniority credit. The proposal would have eliminated veterans' preference for retired military officers with the rank of major or above, and limited its availability for other retired military personnel. See H.R. 11280, 95th Cong., 2d Sess. §§ 304, 305 (1978). Congress incorporated the President's proposals only to the extent they improved benefits for disabled veterans. See notes 5-7, *infra*.

1. The framework of the federal veterans' preference was established in the Veterans' Preference Act of 1944, ch. 287, 58 Stat. 387.² Under the provisions of that Act, preferences are extended to veterans,³ to disabled veterans, and to certain relatives of veterans.⁴ These three groups are called "preference eligibles." 5 U.S.C. 2108(3).

For most jobs in the competitive civil service, veterans who served during a war and who receive a passing grade on an entrance examination are entitled to have five additional points added to their scores. 5 U.S.C. 3309(2). Ten points are added to the test scores of disabled veterans. 5 U.S.C. 3309

² Veterans' preference programs had been enacted by Congress and established by the Executive Branch since the Civil War. Although the 1944 Act was the first comprehensive legislation on the subject, it was designed to codify existing policies with respect to veterans' preferences. See Note, *Veterans' Preference in Public Employment: The History, Constitutionality, and Effect on Federal Personnel Practices of Veterans' Preference Legislation*, 44 Geo. Wash. L. Rev. 623, 624-626 (1976); see also *Fredrick v. United States*, 507 F.2d 1264, 1266-1267 (Ct. Cl. 1974).

³ "Veterans" include those who received honorable discharges from the armed forces after serving on active duty during a war or on active duty for more than 180 consecutive days between 1955 and 1976. Service in the National Guard or military reserves is not credited. 5 U.S.C. 2108(1).

⁴ The qualifying relatives include the unmarried widow or widower of a veteran, 5 U.S.C. 2108(3)(D), the wife or husband of a disabled veteran, 5 U.S.C. 2108(3)(E), and, under certain circumstances, the mother of a disabled veteran or a veteran who lost his life while serving in the armed forces, 5 U.S.C. 2108(3)(F), (G).

(1). In addition, for jobs other than scientific and professional positions in grades GS-9 or higher, qualifying disabled veterans must be considered, in order of their ratings, ahead of any other applicants. 5 U.S.C. 3313.⁵ Similarly, certain civil service jobs—guards, elevator operators, messengers, and custodians—are open only to “preference eligibles” as long as there are any applying for those positions. 5 U.S.C. 3310.

A preference eligible also is entitled to “experience credit” for the time he spent in the armed forces if, when his career was interrupted by military service, he held a job similar to the federal job for which he is competing. 5 U.S.C. 3111(1). Various physical and age requirements for selection and promotion can be waived for a preference eligible if it is determined that he is qualified to perform the job. 5 U.S.C. 3312, 3363. When a preference eligible is passed over for employment in favor of a person who is not a preference eligible, the appointing authority must provide reasons for the decision; the Office of Personnel Management must then determine whether the reasons for passing over the preference eligible are insufficient. The Office

⁵ The Civil Service Reform Act of 1978 added a provision to the federal veterans’ preference program under which agencies may, under certain circumstances, appoint disabled veterans to career positions on a non-competitive basis. Pub. L. No. 95-454, 92 Stat. 1147-1148 (adding 5 U.S.C. 3112).

may require that the preference eligible be hired. 5 U.S.C. 3318(b).⁶

Preference eligibles also enjoy various benefits with respect to job retention and reinstatement. When a preference eligible resigns or is separated or furloughed from his civil service job, he is entitled to have his name placed on eligibility lists for every position for which he is qualified, in accordance with the preference scheme established in Sections 3309 and 3313. See 5 U.S.C. 3314-3316. Preference eligibles enjoy special procedural protections against dismissal for cause, 5 U.S.C. 7512, 7701, and they enjoy a variety of rights to preferential retention when a federal agency undergoes a reduction in force or transfers its functions to another agency. 5 U.S.C. 3501-3504.⁷

2. As is apparent from even this cursory review, the federal veterans’ preference program is in many respects quite different from the Massachusetts preference. The Massachusetts scheme embodies an “absolute preference,” under which all qualifying veterans must be considered for civil service positions ahead of any qualifying non-veterans. By contrast, the federal preference is based, in the main, on a

⁶ The Civil Service Reform Act of 1978 provided new retention rights for certain disabled veterans, among a variety of new benefits for that group. Pub. L. No. 95-454, 92 Stat. 1149.

⁷ This provision was amended slightly by the Civil Service Reform Act of 1978, to provide that the preference eligible shall be sent a copy of the Office’s findings and, under certain circumstances, will be afforded an opportunity to contest those findings. Pub. L. No. 95-454, 92 Stat. 1148.

"point system," under which the preference merely augments each veteran's score and thus permits high-scoring non-veterans to be considered ahead of low-scoring veterans. The federal veterans' preference also provides a variety of more particular benefits to veterans, including experience credits, waivers of certain job requirements, and special retention and reinstatement rights.

In spite of these substantial differences, the federal preference is similar to the Massachusetts preference in certain limited respects. First, the requirement that the list of qualifying disabled veterans be exhausted before other qualifying candidates can be considered for certain jobs (5 U.S.C. 3313) parallels the operation of the Massachusetts scheme, although it is limited to certain jobs and to disabled veterans. Second, the restriction of the jobs of elevator operators, guards, messengers, and custodians to veterans as long as any are available (5 U.S.C. 3310) creates an even greater theoretical preference for those positions than the Massachusetts scheme, since minimum qualifications are not specified for those jobs under the federal statute. Finally, the federal veterans' preference benefits precisely the same class as does the Massachusetts preference. Thus, the same constitutional challenges based on the sexual composition of the beneficiary class that are made in this case might apply as well with respect to the federal veterans' preference.

Because of the similarities between the Massachusetts veterans' preference and the federal pref-

erence, the United States has an interest in participating in this case in order to defend those portions of the federal veterans' preference—as it exists or as modified by the President's proposals—that might be affected by the Court's ruling in this case. Moreover, the United States has an interest in articulating the considerations that, in our view, would support the constitutionality of both the federal veterans' preference scheme and federal veterans' benefits in general against equal protection claims of the sort raised here.⁸ Finally, the United States has a more general interest as well: to defend the prerogatives of Congress and the Executive Branch to adopt

⁸ Veterans' benefits, other than the veterans' preference in public employment, include a wide range of programs. Among them are educational benefits, both for veterans and for their survivors and dependents, 38 U.S.C. 1601-1799; hospital and medical care, 38 U.S.C. 601-654; special home, farm, and business loan programs, 38 U.S.C. 1801-1827; compensation for veterans who die or are disabled as the result of a service-connected injury or disease, 38 U.S.C. 301-362; pensions for those suffering from non-service-connected disabilities, 38 U.S.C. 501-562; a special life insurance program, 38 U.S.C. 701-788; and various rehabilitation and job training and counseling services, 38 U.S.C. 1501-1511, 2001-2008.

In addition, federal law provides that a person who leaves a position with either a public or private employer for a period in the military service must be reinstated, after his period in the service, to a position similar in seniority, status, and pay to the one he left, unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so. 38 U.S.C. 2021-2026. Moreover, private employers contracting with the United States must agree to take affirmative action to employ disabled veterans and veterans of the Vietnam era. 38 U.S.C. 2012.

employment preferences for veterans and other groups without being subject to constitutional invalidation because of the incidental consequences of such preferences on other classes of employees or applicants.

STATEMENT

1. Massachusetts law provides that persons who pass examinations for appointment to state civil service positions⁹ are placed on eligibility lists in the following order: first, all disabled veterans in order of their scores; second, all other veterans in order of their scores; next, widows and widowed mothers of veterans who were killed in action or who died as a result of service-connected disabilities, in order of their scores and finally, all other applicants in order of their scores. Mass. Gen. Laws ch. 31, § 23 (1973). The law further provides that a disabled veteran shall be retained in employment in preference to all other persons, including other veterans. *Ibid.*¹⁰

⁹ The "examinations" may be in part written and in part a measure of the applicants' training and experience, or they may be solely a measure of training and experience. In either event, relevant experience in military service is credited (A. 73).

¹⁰ The Massachusetts system provides certain additional benefits for veterans, including eligibility for employment without examination for certain highly decorated veterans, Mass. Gen. Laws ch. 31, § 22 (1973); waiver of minimum age requirements for veterans applying to police and fire departments, *id.*, § 22A; and preferences in selection to provisional appointments and to public labor services in the state, *id.* at §§ 24, 25.

When a state agency needs to fill a position designated as a civil service job, it notifies the Civil Service Division.¹¹ The Division then certifies a number of candidates for appointment from the top of the appropriate eligibility list and forwards those names to the agency. The agency may appoint an employee from among the names forwarded (A. 198).

2. In March 1975 appellee filed this action in the United States District Court for the District of Massachusetts. She sought declaratory and injunctive relief against the operation of the Massachusetts veterans' preference statute, alleging that it violates the Equal Protection Clause of the Fourteenth Amendment by discriminating against women.¹²

Appellee, a female non-veteran, took the Massachusetts civil service examinations for two administrative positions with the state Department of Mental Health. Although she received high scores on both examinations, the application of the veterans' preference caused her to be ranked behind a number of veterans, including many who received lower scores on the examinations than she did (A. 205). Shortly after filing her complaint in this action, appellee sought and obtained an order barring the

¹¹ As of 1976 approximately 60% of the state jobs in Massachusetts were subject to the state civil service selection system (A. 196).

¹² No statutory claim was brought under Title VII of the Civil Rights Act of 1964, because Congress has provided that veterans' preference statutes are not subject to Title VII challenge. 42 U.S.C. 2000e-11.

state defendants from making permanent appointments to the two positions at issue, pending the outcome of the litigation (A. 195-196). The court then consolidated appellee's case with a similar action that had been brought by a female non-veteran seeking employment as an attorney with the Commonwealth, a position that at that time was subject to the state civil service selection provisions, including the veterans' preference.

A three-judge court was convened to consider the consolidated challenges to the veterans' preference statute. Prior to the court's decision, Massachusetts removed attorneys from the competitive civil service system. Accordingly, the action brought by the female attorney became moot (A. 206-211). The court reached the merits of appellee's claim, however, and held that the veterans' preference scheme unlawfully discriminates against women, in violation of the Equal Protection Clause of the Fourteenth Amendment (A. 221).

The court acknowledged at the outset that the Massachusetts veterans' preference, which is facially neutral with respect to sex, "was not enacted for the purpose of disqualifying women from receiving civil service appointments" (A. 212). The court further acknowledged that the State has a legitimate interest in assisting veterans by providing special treatment to them in the selection of public employees (A. 213). This interest, according to the court, is founded in the State's legitimate desire "to encourage service in the armed services, reward those

whose lives have been disrupted because they have served, and provide some assistance during the sometimes uneasy transition from military to civilian life" (A. 214-215).

In spite of these considerations, the court held that, because the Massachusetts veterans' preference substantially diminishes women's employment opportunities, it violates the Equal Protection Clause. The "worthy purpose" of the legislative program is not enough to shield it from judicial scrutiny, the court wrote. Instead, "[i]n the context of the Fourteenth Amendment, '[t]he result, not the specific intent, is what matters'" (A. 215, quoting from *Rozecki v. Gaughan*, 459 F.2d 6, 8 (1st Cir. 1972)). Although the court noted that women had been appointed to approximately 43% of the permanent civil service positions in a sample 10-year period, it found that because of the veterans' preference few women had been considered for high-ranking positions in the state civil service (A. 218).¹³ Because, as a practical matter, "status as a veteran [is a] *sine qua non* for

¹³ The court observed that the percentage of female civil service appointees is "inescapably tied to circumstances totally beyond their control, or choice—the federal government's policy of limiting the number of women who may serve in the armed forces" (A. 218). Although the court expressed no opinion on the constitutionality of the statutes and regulations relating to women's participation in the military (A. 219 n.12), it concluded that the "combination of federal military enrollment regulations with the Veterans' Preference is a one-two punch that absolutely and permanently forecloses, on average, 98% of this state's women from obtaining significant civil service appointments" (A. 218-219).

obtaining the most attractive positions in the state civil service," the court held that "Massachusetts has effectively and unquestioningly incorporated into its public employment policy a set of criteria having no demonstrable relation to an individual's fitness for civilian public service" (A. 219).

The court stated that, in spite of its effect on women's employment opportunities, the Massachusetts veterans' preference system "might escape constitutional rejection if it were the only means by which the state could implement a program of veterans assistance in the area of public employment" (A. 219). But because in the court's view the State could have selected methods of benefitting veterans "without doing so at the singular expense of * * * its women" (*ibid.*),¹⁴ the court concluded that the method chosen had too severe an effect on job opportunities for women to be sustained under the Equal Protection Clause.

Judge Murray dissented. He first observed that the veterans' preference statute is neutral on its face with respect to sex: female veterans are accorded the same preference as male veterans (A. 231). If there exists an almost insuperable barrier to women attaining higher civil service jobs, Judge Murray observed, "it is a circumstance that non-veteran women share with a large number of non-veteran men" (A. 232). Be-

¹⁴ The court suggested that a point system that offered some reward for time spent in the military or a time limit for exercising the preference might be adopted. Nevertheless, the court declined to say that either of these provisions would be constitutional.

cause, as the majority had acknowledged, the statute was not enacted with the intent of disqualifying women from civil service positions, Judge Murray considered the statutory distinction between veterans and non-veterans to be neither a gender-based classification nor a pretextual device by which to discriminate against women. Accordingly, Judge Murray would have assessed the veterans' preference under traditional equal protection standards, justifying the employment preference to veterans on three grounds: as a reward to veterans for their service to their country; as a device to take account of the valuable experience veterans gain in military service; and as an aid in the rehabilitation of veterans whose lives have been disrupted by a period of military service (A. 235).¹⁵ On the basis of the court's finding that this case involves only "non-intentional adverse discriminatory impact on women," Judge Murray objected to the court's use of the more exacting test employed in cases involving classifications by gender (A. 237).

Judge Murray disagreed with the court's conclusion that the veterans' preference statute "suspends the application of * * * job-related criteria and substitutes a formula that relegates demonstrable professional qualifications to a secondary position, absolutely and permanently" (A. 239). This conclusion, he wrote, "assumes the unacceptable premise that only

¹⁵ The statute defines veterans to include both men and women. Mass. Gen. Laws ch. 4, § 7 (1973); *id.* at ch. 31, §§ 21, 21A.

selection criteria adhering exclusively and strictly to raw test score meet the standard of 'demonstrable professional qualifications' " (*ibid.*). Even apart from the veterans' preference, Judge Murray pointed out, the Commonwealth does not insist that candidates for civil service jobs be selected solely on the basis of their raw scores on the civil service examinations. Finally, he characterized the court's assertion that the veterans' preference is absolute and permanent as "but another way of declaring that 'the preference accorded to veterans is simply too great' * * * not that there is no rational basis for the classification" (*ibid.*).

3. The State's Attorney General appealed the district court's judgment to this Court. After first certifying a procedural question to the Supreme Judicial Court of Massachusetts,¹⁶ this Court vacated the judgment of the district court and remanded the case for further consideration in light of the intervening decision in *Washington v. Davis*, 426 U.S. 229 (1976). 434 U.S. 884 (1977).¹⁷

¹⁶ The Court certified the question whether Massachusetts law authorizes the Attorney General of the Commonwealth to prosecute an appeal to the Supreme Court from the judgment of the district court without the consent (and over the objections) of the state officers against whom the judgment of the district court was entered. 429 U.S. 66 (1976). The Supreme Judicial Court of Massachusetts answered the question in the affirmative. *Feeney v. Commonwealth*, 366 N.E.2d 1262 (1977).

¹⁷ While the case was pending on appeal, Massachusetts enacted a temporary veterans' preference statute providing a

The district court adhered to its determination that the Massachusetts veterans' preference statute is unconstitutional. The court concluded that *Washington v. Davis*, *supra*, and the subsequent decision in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), support its holding that the veterans' preference deprives women of the equal protection of the laws (A. 252).

The court acknowledged that *Washington v. Davis* held "that claims of invidious discrimination under the fifth or fourteenth amendments require proof of a discriminatory purpose" (A. 257). Although it had previously found that the Massachusetts veterans' preference "was not enacted for the purpose of disqualifying women from receiving civil service appointments" (A. 212), on remand the district court found that the required showing of discriminatory purpose had been made.

The veterans' preference, according to the court, "had the natural, foreseeable and inevitable effect of producing a discriminatory impact" (A. 259), and the legislature therefore was at least "chargeable with knowledge of the long-standing federal regulations limiting opportunities for women in the military, and the inevitable discriminatory consequences produced by their application to the challenged formula" (A. 260). Although the Commonwealth's *motive* was to benefit its veterans, the court concluded,

modified point preference for veterans. That statute will remain in effect only until a final judgment is entered in this case. Mass. Gen. Laws ch. 31, § 23 (Supp. 1978-1979).

its *intent* was "to achieve that purpose by subordinating employment opportunities of its women" (A. 264). The intent to discriminate was established, according to the court, because "[t]he course of action chosen by the Commonwealth had the inevitable consequence of discriminating against the women of this state" (*ibid.*).

In a concurring opinion, Judge Campbell acknowledged that a statutory classification that is neutral with respect to sex or race would not be unconstitutional simply because it has an incidental unequal effect on one or another sexual or racial group (A. 266-267). But in his view the apparent neutrality of the veterans' preference law and the apparent absence of intentional discrimination "are both open to serious question" (A. 267). The veterans' preference may be facially neutral in a limited sense, Judge Campbell wrote, because "it is not based overtly on selection by sex, but since the preferred class is 98% male the effect is virtually the same as if it were" (*ibid.*). Judge Campbell also concluded that the effect of the veterans' preference on women is "inevitable," and that the "inevitability of exclusionary impact * * * undermines the argument of no discriminatory intent" (A. 268). Accordingly, Judge Campbell concluded that the "destruction of normal female opportunities in the state employment system is too evident a consequence of the super-imposition of veterans as an absolutely preferred class upon that system" to withstand constitutional challenge (A. 269).

Again, Judge Murray dissented. Although he acknowledged that in operation the statute "favors

males in greater proportion than females for the higher civil service positions," Judge Murray concluded that "the statutory classification has not been shown to be a mere pretext to accomplish the purpose of invidiously discriminating against women" (A. 271). To the contrary, as the majority itself had acknowledged, the legislature had apparently selected the veterans' preference for the sole purpose of aiding veterans. Because the record "does not show the operation of the statute and its effect to be a clear pattern, unexplainable on grounds other than an intent to limit the employment opportunities of women" (A. 272-273), Judge Murray concluded that the showing of discriminatory purpose required by *Washington v. Davis* was not made in this case and that the veterans' preference statute therefore should have been sustained.

The fact that the legislature could have chosen a more limited form of preference "provides no ground for indictment of the legislature's motive," Judge Murray stated (A. 277). It indicates that the legislature chose to provide veterans with a more substantial benefit, but not that it chose to do so in order to disadvantage women. Finally, Judge Murray observed that there is no reason to suppose that the veterans' preference statute would not have been enacted "if women were represented in the armed services in such numbers that the preference would have no discriminatory effect" (A. 279). Thus, it cannot be said that the enactment of the veterans' preference was caused by any legislative intent to discrim-

inate against women. For that reason as well, Judge Murray concluded that the Massachusetts veterans' preference should not be struck down.

SUMMARY OF ARGUMENT

Official action will not be held unconstitutional solely because it results in a disproportionate effect on a protected class. *Washington v. Davis*, 426 U.S. 229 (1976), held that proof of a discriminatory purpose also is necessary to establish a violation of the Equal Protection Clause. Evidence that a challenged decision or statute has a disproportionate effect may often be relevant to the issue of discriminatory purpose. But even though evidence of effect may well enlighten the inquiry into purpose, it cannot displace it.

The district court found that the Massachusetts legislature had adopted the veterans' preference statute for the laudable purpose of aiding veterans. But, the court also found, the legislature must have known that because the class of veterans is overwhelmingly male, the veterans' preference would achieve its purpose at the expense of employment opportunities for women. Applying the principle that a person is deemed to intend the natural and foreseeable consequences of his actions, the district court found that the Massachusetts legislature "intended" to injure the employment interests of women when it enacted its veterans' preference statute, even though that legislation was not enacted for that "purpose."

That was error. This Court's discussions of the intent or purpose that is required to establish an equal protection violation make it clear that "intent," "purpose," and "motive" are the same. The natural and foreseeable consequences of governmental actions may constitute probative evidence of discriminatory intent and may therefore require the production of convincing evidence of legitimate purposes. But here it is clear that the Massachusetts veterans' preference was intended to achieve legitimate objectives and not to discriminate against women.

The district court based its ruling in part on its view that the Massachusetts veterans' preference statute served no purpose whatever as a predictor of job performance in state civil service jobs. In so doing, the court appears not to have taken fully into account the legitimate purposes that a veteran's preference may serve, independent of any use it may have as an employment selection device. Veterans' preference schemes in general, and the federal program in particular, have traditionally been regarded as primarily serving several related purposes: to reward veterans for having served the country, usually at some personal sacrifice; to induce others to serve; and to facilitate the veterans' return to civilian life. The Massachusetts veterans' preference does not perpetuate any unlawful discrimination against women in the military. The basic distinctions by gender in the military are rational and serve important interests. We believe that particularly in light of Con-

gress' broad discretion in the realm of military affairs, those distinctions are not unlawful.

Finally, proof that a particular statute was motivated in part by an improper purpose does not necessarily require that the challenged statute be invalidated. It merely shifts the burden to the defendant to show that the same action would have been taken even if the impermissible purpose had not been considered. Accordingly, in this case even if the district court was correct that the Massachusetts veterans' preference statute constituted intentional discrimination against women, the State should have an opportunity to show that the legislature would have enacted the veterans' preference even if it had no effect on women.

In saying this, the United States does not endorse the Massachusetts veterans' preference or any particular form of veterans' preference. We have noted above that the President wishes to modify the existing federal preference system. The federal system—as it exists or as the President has proposed to change it—is different from the Massachusetts system in many respects. We do not address policy issues here except to note the reasons why, in our view, the federal veterans' preference is a rational and constitutionally permissible response to legitimate governmental concerns. Our argument is that the district court erroneously analyzed the constitutional issue in this case, and for that reason the judgment of the district court should be reversed.

ARGUMENT

I

THE VETERANS' PREFERENCE STATUTE DOES NOT PURPOSEFULLY DISCRIMINATE AGAINST WOMEN

A. Only Purposeful Discrimination Violates the Equal Protection Clause

Governments enact thousands of statutes. It is inevitable that some of these statutes will affect some groups more and in different ways than they affect others. The disparity in effect is apparent from even a cursory examination of significant governmental programs. For example, federal programs for the assistance of farmers aid a group that is overwhelmingly white and male. Federal and state social welfare programs assist many groups that are quite unlike the population at large: welfare programs assist poor persons who, because of social discrimination, are proportionately more black or Hispanic than is the general population; old age programs assist persons who, because of the mortality rates of men, are unusually likely to be female. The National Endowment for the Arts supports orchestras and ballet companies that are patronized predominantly by the well-to-do. In light of the preference of some religious groups for parochial education, public support of the public schools assists a population that is more Protestant than the population as a whole. The list could be extended almost indefinitely.

Few would argue, however, that the effects of these and other programs make them vulnerable to constitutional challenge. This is so because, as the Court has held, the mere fact that a public program affects members of one group more than it affects members of some other group does not mean that it is unconstitutional. To establish a violation of the Equal Protection Clause, a plaintiff usually must show both that the challenged action has a disproportionate effect on a particular class and that it was undertaken with the intent to affect that disfavored class. *Washington v. Davis*, 426 U.S. 229 (1976); *Keyes v. School District No. 1, Denver Colorado*, 413 U.S. 189, 205, 208 (1973). In other words, the plaintiff must establish that "discriminatory purpose has been a motivating factor" in the decision to take the challenged action. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265-266, 270-271 n.21 (1977).

The "intent" requirement plays an important role in constitutional adjudication. Ordinary adjudication assesses the validity of a statute on its face. If the statute or rule refers to a particular class of persons, then the legislature must support its decision by whatever standard of justification is appropriate given the nature of the class sought to be affected. If the legislation on its face is neutral with respect to the classes particularly protected by the Equal Protection Clause, then the judicial inquiry usually is not searching; the Clause guarantees equal treatment by the law itself, but it does not guarantee that the law will yield equal results. If

groups of persons are unequally affected by the evenhanded application of an evenhanded statute, they suffer no constitutional injury. *Washington v. Davis*, *supra*. In many cases the disproportionate effects of a neutral statute may simply be evidence of private inequality that predated the law; because the Fourteenth Amendment reaches only inequalities caused by state action, the failure of a law to overcome such private inequalities provides no basis for constitutional objection. *Jefferson v. Hackney*, 406 U.S. 535, 548 (1972); *Maher v. Roe*, 432 U.S. 464, 470-477 (1977).

But it is not always sufficient to assess the constitutionality of a statute, rule, or practice on its face. Facial neutrality may be but a mask for the legislature's goals. A statute may use a facially neutral standard only because that standard is a close proxy for some other, forbidden, characteristic. The fact that a school board always offers a non-racial reason for its decisions is not enough to shield those decisions from scrutiny if they routinely favor maximum separation of the races; a court will look behind the facial criteria of decision to find some unexpressed criterion that accounts more accurately for the decisions.

Unless courts look behind the face of a statute or policy, they permit sophisticated discrimination to proceed unimpeded.¹⁸ When a single facially neutral

¹⁸ See Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 Sup. Ct. Rev. 95, 116-118.

policy happens to have an effect more harsh on women than on men there is usually no reason to be concerned; ordinarily it would be expected that some other policy would cut the other way. When the decisionmaker harbors an intent to make decisions on the ground of sex, however, the long-run neutrality that is the product of a series of adventitious effects will vanish; a legislature that resorts to unstated gender-based grounds for decision can be expected to limit the extent to which some policies adventitiously would favor women, and to augment the extent to which others favor men. In other words, an intent on the part of legislators to take gender into account in making decisions increases the likelihood that the incidental effects of all of its actions will be in the same direction. That sort of cumulative effect is at the core of the prohibition of the antidiscrimination principle.¹⁹

More than that, an intent to use an unstated characteristic as a rule of decision adds insult to injury. Racial segregation in the schools is unlawful not simply because it produces one-race classes but also because the very fact of purposeful separation imposes a stigma on those cast out. The purpose to use a particular ground of decision may make the result invidious, even though the same result, for a different reason, would be inoffensive. See *Keyes, supra*; *City of Richmond v. United States*, 422

¹⁹ See Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 Harv. L. Rev. 1, 8-12, 26-31 (1976).

U.S. 358, 378-379 (1975); *Regents of the University of California v. Bakke*, No. 76-811 (June 28, 1978), *slip op.* 37-38 (opinion of Brennan, White, Marshall and Blackmun, JJ.).

As this discussion indicates, the Court has referred to the intent of the decisionmaker in order to identify those cases in which an unstated reason or ground of decision makes the statute or rule as offensive as if the reason had been stated expressly. The Court inquires into the "real" reasons for a decision in order to determine whether the statute or rule depends in part on an unstated, but forbidden or suspect, characteristic for its force and purpose. This role for "intent" in constitutional adjudication suggests the reason that intent is not found *solely* because a statute has a disproportionate effect on certain groups. The inquiry into intent is an inquiry into the "real" grounds of decision, into whether the decision is part of a pattern of decisions, into whether the decision adds insult to injury. If the simple fact of disproportionate consequences were enough to show "intent to discriminate," and consequently unconstitutionality, the intent inquiry would not serve these purposes. Indeed, it would not serve any independent purpose at all.

B. Awareness of Probable Disparate Effect Is Not the Same as Purposeful Discrimination

Like the federal veterans' preference, the Massachusetts veterans' preference statute is neutral on its face with respect to gender. Veterans—male and

female—are given certain advantages in selection for civil service jobs over non-veterans—male and female. The district court found that the veterans' preference statute was not designed as a pretextual device by which to discriminate against women (A. 212). To the contrary, the court found that the legislature's purpose, motive, and design in enacting the veterans' preference were just what they appeared to be: to benefit veterans (A. 213-216, 219, 254, 264). The court concluded, moreover, that this purpose is legitimate and that it is served by the veterans' preference (A. 215). Yet the court found that although the legislature did not have the "purpose" of limiting women's employment opportunities, it nonetheless had the "intention" to do so.

In distinguishing between purpose and intent—and giving conclusive significance to intent—the court relied on the principle that an actor ordinarily is deemed to intend the natural and foreseeable consequences of his acts. Because the veterans' preference has the "natural, foreseeable and inevitable effect of producing a discriminatory impact" (A. 259), the court held that the Massachusetts legislature intended to achieve its purpose of aiding veterans by "subordinating employment opportunities of its women" (A. 264). "The fact that the Commonwealth had a salutary motive," the court concluded, "does not justify its intention to realize that end by disadvantaging its women" (*ibid.*).²⁰

²⁰ Judge Campbell's concurring opinion provides a concise statement of the court's rationale (A. 268):

The district court's distinction between purpose and intent in illusory. This Court has used the terms interchangeably to refer to the factor or factors that motivated the persons who took the challenged action. See *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 414 (1977); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, *supra*, 429 U.S. at 265-266; *Washington v. Davis*, *supra*, 426 U.S. at 240-242; *Keyes v. School District No. 1, Denver, Colorado*, *supra*, 413 U.S. at 208, 210-211; cf. *Jefferson v. Hackney*, *supra*; *Wright v. Rockefeller*, 376 U.S. 52, 56, 58 (1964). Because the district court found that injuring women was not among the considerations motivating the legislature to enact the veterans' preference, it could not properly conclude that the statute's effect on women was "intended" by the legislature. Intent, in the constitutional sense, refers to the factor or factors that motivated or contributed to the decision. An effect

This same inevitability of exclusionary impact upon women * * * undermines the argument of no discriminatory intent. There is a difference between goals and intent. Conceding, as we all must, that the goal here was to benefit the veteran, there is no reason to absolve the legislature from awareness that the means chosen to achieve this goal would freeze women out of all those state jobs actively sought by men. To be sure, the legislature did not wish to harm women. But the cutting-off of women's [employment] opportunities was an inevitable concomitant of the chosen scheme—as inevitable as the proposition that if tails is up, heads must be down. Where a law's consequences are *that* inevitable, can they meaningfully be described as unintended?

of a statute is "intended" only if that effect is a desired consequence.²¹ By using the word "intent" to refer to the incidental, albeit inevitable, consequences of a statute designed to serve legitimate ends, the district court adopted an approach not materially different from the "effect" theory of equal protection that this Court has rejected.

To be sure, proof that a challenged statute has a disparate effect on a particular group may be important in ascertaining the intent of the decision-maker. As the Court stated in *Village of Arlington Heights, supra*, 429 U.S. at 266:

²¹ The Court's use of the term "intent" accords with the definition devised recently by Charles Fried: "[O]ne intends a result if that result is chosen either as one's ultimate end or as one's means to that end. One intends a result just in case one can say that one acted (or failed to act) in order to produce that result, just in case one would have to include that result in answer to the question 'Why did you do that?' or 'Why did you fail to do that?' Moreover, there are consequences of one's acting which, though foreseen with ever so much likelihood, are not intended at all. These results are mere side effects, [and they are so treated if one would act as one did even if the side effects vanished]." C. Fried, *Right and Wrong* 22 (1978).

The Court's analysis also accords with that suggested by Paul Brest in his thoughtful article, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 Sup. Ct. Rev. 95. According to Professor Brest, the objectives or purposes of a rule can be defined as "the state of affairs or effects that the decisionmaker seeks to establish or retain by promulgation of the rule." *Id.* at 104. "This means that for purposes of judicial review of motivation a decisionmaker does not necessarily have as his objective all of the foreseen consequences of his decision." *Id.* at 105 n.59.

Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. The impact of the official action—whether it "bears more heavily on one race than another," *Washington v. Davis, supra*, at 242—may provide an important starting point.

Where disparate effect is very difficult to explain except as the product of purposeful discrimination, the evidence of effect may for all practical purposes establish the violation. *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Guinn v. United States*, 238 U.S. 347 (1915).²² Indeed, in some circumstances, evidence of a grossly disproportionate effect on a protected class justifies shifting the burden to the state to produce evidence that this effect was not the product of purposeful discrimination. See *Castaneda v. Partida*, 430 U.S. 482, 494 & n.13 (1977); *Washington v. Davis, supra*, 426 U.S. at 241; *Alexander v. Louisiana*, 405 U.S. 625, 632 (1972).²³ But even in such

²² Nothing shows intent as well as a demonstration that a series of decisions *all* have a disparate effect. See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). Such a demonstration shows a cumulation of disadvantage inexplicable on grounds other than the forbidden but unstated characteristic.

²³ We have argued, and several courts of appeals have held, that once plaintiffs demonstrate that particular official action foreseeably resulted in segregation in the schools, that evidence creates a presumption that the action was taken with a discriminatory purpose. See *United States v. School District of Omaha*, 521 F.2d 530, 535-536 (8th Cir.), cert. denied, 423 U.S. 946 (1975); *Oliver v. Michigan State Board of Edu-*

cases, if the state official establishes that the prohibited factor was not part of the motivation for the decision, the equal protection claim must fail.²⁴

Thus, no matter how compelling it may be, proof regarding the effect of a facially neutral statute is relevant only insofar as it sheds light on the ultimate question of discriminatory purpose. Evidence of disparate effect may make a finding of discriminatory purpose inevitable, but it can never make it unnecessary. Accordingly, the principle that one is deemed to intend the foreseeable and natural consequences of one's acts is applicable in equal protection analysis

cation, 508 F.2d 178, 182 (6th Cir. 1974), cert. denied, 421 U.S. 963 (1975); *United States v. Texas Education Agency*, 532 F.2d 380, 387-389 (5th Cir.), vacated and remanded, 429 U.S. 990 (1976). See generally Note, *Reading the Mind of the School Board: Segregative Intent and the De Facto/De Jure Distinction*, 86 Yale L.J. 317 (1976). Some commentators have suggested a burden-shifting approach whenever a showing is made that the state's action had an uneven impact on a protected class. See Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U.L. Rev. 36, 56 (1977); Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. Pa. L. Rev. 540, 559-560 (1977).

Because the district court found that the purpose of the veterans' preference statute was to aid veterans, not to injure women, it is not necessary to consider whether the evidence of disparate effect in this case was sufficient to shift the burden to the State to produce evidence that intent to discriminate was not a motivating factor in its decision.

²⁴ It should be clear, of course, that there may be more than one motive for a given decision. *Village of Arlington Heights* demonstrates that a plaintiff makes out a violation by showing that any one of the motives is improper.

only insofar as it suggests that evidence of foreseeable effects may be relevant to the issue of discriminatory purpose. See *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 179-180 (1977) (Stewart, J., concurring); *United States v. City of Chicago*, 549 F.2d 415, 435 (7th Cir. 1977); *Branch v. Du Bois*, 418 F. Supp. 1128, 1133 (N.D. Ill. 1976) (three-judge court).²⁵ In this case, then, when the district court found that the purpose of the veterans' preference statute was to aid veterans and not

²⁵ The principle that one is deemed to intend the natural and foreseeable consequences of one's acts has a somewhat different application in tort law. Its principal use is to define the scope of damages liability. A person who acts negligently is liable only for the consequences that a reasonable man should have foreseen, whether or not he adverts to the risk. But if the person desires to cause the injury complained of, he is subject to the broader liability imposed for the so-called "intentional torts." Moreover, if he is substantially certain that injury will result from his acts, the person is still subject to the broader rules of liability, because the definition of intent incorporates not only those consequences that the actor desires to bring about, but also those consequences that he knows are certain or substantially certain to follow from his acts. *Restatement (Second) of Torts* §§ 8A, 20 (1965). W. Prosser, *Law of Torts* 32 (4th ed. 1971).

Because the intentional torts are presumed to be unjustified intrusions on the rights of others, the law does not distinguish between those intrusions that the actor desires to bring about and those that he knows will occur but simply does not bother to avoid. In the case of official action that is subject to equal protection scrutiny, no such presumption of impropriety obtains. Therefore, the Court has held that state action designed to serve neutral ends should be upheld if there is a rational basis for the action. See *Washington v. Davis*, *supra*, 426 U.S. at 247-248. This analytical difference indicates that tort principles cannot be applied uncritically in equal protection cases.

to injure women, that should have been the end of the matter.

C. Governments Have Legitimate Reasons for Adopting Veterans' Preference Statutes

In its first opinion, the district court recognized that a veterans' preference serves "the legitimate state purpose of assisting veterans" (A. 213). It "is designed to encourage service in the armed services, reward those whose lives have been disrupted because they have served, and provide some assistance during the sometimes uneasy transition from military to civilian life" (A. 214-215). The veterans' preference, the court concluded, "recognizes both the special problems of veterans and the need to promote an important aspect of the nation's welfare" (A. 215).

In its second opinion, the district court did not focus on any of these justifications for the veterans' preference. Instead, the court rested its finding of discriminatory intent in part on its view that the veterans' preference is of no value in predicting an individual's performance in a civil service job (A. 261). In so doing, the court ignored the justifications for veterans' preference statutes that it had acknowledged in its first opinion. Those justifications—encouraging enlistment, rewarding service, and assisting reintegration into civilian life—have been relied on repeatedly by the courts in sustaining both state and federal veterans' preferences against constitu-

tional attack. As Judge Friendly noted with respect to a New York veterans' preference statute:

The desire to compensate in some measure for the disruption of a way of life and often of previous employment occasioned by service in the armed forces and to express gratitude for such service is a rational basis for giving veterans a larger measure of job security.

Russell v. Hodges, 470 F.2d 212, 218 (2d Cir. 1972). See also *Fredrick v. United States*, 507 F.2d 1264, 1266-1267 (Ct. Cl. 1974); *Bannerman v. Department of Youth Authority*, 436 F. Supp. 1273 (N.D. Cal. 1977); *Branch v. Du Bois*, 418 F. Supp. 1128 (N.D. Ill. 1976); *Feinerman v. Jones*, 356 F. Supp. 252 (M.D. Pa. 1973) (three-judge court); *Koelfgen v. Jackson*, 355 F. Supp. 243, 251-252 (D. Minn. 1972) (three-judge court), aff'd mem., 410 U.S. 976 (1973); cf. *Johnson v. Robison*, 415 U.S. 361, 378-383 (1974).²⁶

Nothing in the Constitution requires a state or the federal government to adhere strictly to the results of its competitive examinations in appointing persons to civil service positions. Indeed, a state would be free to abandon merit selection procedures altogether in choosing its public employees.²⁷ Accordingly, there is no constitutional infirmity in the state's decision

²⁶ See also *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953) (sustaining veterans' preference by private employer); *Hilton v. Sullivan*, 334 U.S. 323 (1948) (sustaining veterans' retention preference in federal employment).

²⁷ See *Elrod v. Burns*, 427 U.S. 347 (1976) (semble).

to give substantial weight to other social policies—such as those promoted by the veterans' preference—in selecting civil service employees.

An example may help to illustrate this point. A state might well determine that in the interest of rehabilitating prior offenders, it should reserve a large number of state jobs for former convicts. For the jobs set aside for the project, the selection of convicts would displace "merit" selection devices such as civil service examinations. Moreover, in light of the predominantly male character of prison populations, the project would doubtless provide jobs to more men than women. But we doubt that a serious constitutional challenge could be mounted against the project unless it could be shown that the desire to deprive women of job opportunities in the state civil service played some role in persuading the decisionmaker to adopt the policy.

Although Massachusetts has a legitimate interest in the related goals of encouraging and rewarding service in the armed forces and assisting persons who have served in the military to make the transition back to a civilian economy, the federal government's interest in these goals is even stronger. These interests would support the federal program regardless of the Court's decision in the present case.

The federal government is responsible for raising armies. It therefore has a direct and substantial interest in encouraging enlistment in the armed services. The benefits that accrue to veterans following their period of active duty may serve as an induce-

ment to enlistment, and Congress legitimately may seek to offer a variety of inducements—salaries, pensions, educational benefits, hospitalization, employment preferences—that are apt to be attractive to different degrees to different persons. The Court held in *Johnson v. Robison*, *supra*, 415 U.S. at 382-383, that this rationale justifies veterans' educational benefits, even though those benefits are unavailable to persons whose beliefs lead them to be conscientious objectors. Moreover, the federal government, as employer of its soldiers, has an interest in compensating them adequately for the service they provide. The veterans' employment preference, like military pensions, educational benefits, low-interest loan guarantees and veterans' administration services and privileges, may serve as deferred compensation for a period of service during which a veteran is generally substantially undercompensated.

Like other forms of deferred compensation to veterans, the federal veterans' preference doubtless benefits men as a class more than it benefits women. So, for that matter, does the payment of salaries to persons now in the service benefit a class that is overwhelmingly male. In spite of this, however, it is inconceivable that salaries, veterans' hospital privileges, veterans' educational benefits, and veterans' loan programs would be subject to serious constitutional challenge as violating the rights of women.²⁸ Cf. *Wash-*

²⁸ This Court has held that for purposes of constitutional analysis, employment opportunities must be treated just like

ington v. Davis, supra, 426 U.S. at 248; *Jefferson v. Hackney, supra*, 406 U.S. at 548.

Although the present federal system operates in a different fashion, the veterans' employment preference—as changed by the President's proposal or otherwise—is justified in principle by considerations similar to those pertaining to these other kinds of benefits conferred on veterans, and the constitutional arguments are also related.²⁹ Whether Congress extends a benefit to veterans in the form of a direct money payment, an exclusive right to certain federal services, or a competitive advantage in some area of the economy under federal control, the benefit provides federal resources to veterans at the relative expense of non-veterans.³⁰ Determining how great those benefits

other economic benefits. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976).

²⁹ Veterans' pensions, for example, are paid out of general revenues.

³⁰ As Judge Murray pointed out, the district court's suggestion that Massachusetts could have chosen an "effective, but less drastic, alternative[]" (A. 239) in its effort to aid veterans is simply a suggestion that the State reduce the size of the preference given to veterans (A. 220). It misses the point of veterans' preferences to suppose that the preference would serve its purpose just as well if it were reduced in magnitude. Because the purpose of a veterans' preference is to give veterans a relative advantage in the competition for certain public jobs, the size of the advantage conferred is the essence of the legislation. Unlike cases in which the legislative goal could be achieved equally well by means less destructive of other important interests, in the case of the veterans' preference the "effectiveness" of the statute in serving the legislative aims is reduced, *pro tanto*, as the preference is re-

should be, and what form they should take, is a matter for Congress, the Executive Branch, and the state legislatures.

D. Federal Restrictions on Women's Participation in the Military Do Not Bring the Massachusetts Veterans' Preference into Conflict with the Equal Protection Clause

In finding that the veterans' preference discriminates against women, the district court relied in part on the fact that the federal government traditionally has restricted the role of women in the military. In the past, and to some extent in the present, the federal government has limited the number of women who could enlist and has barred women from certain kinds of military activities, such as combat duty. The district court did not suggest that the federal restrictions on the role of women in the military are unconstitutional or otherwise unlawful (A. 219 n.18). Instead, the court relied on these restrictions to support its conclusion that the Massachusetts legislature must have realized that the veterans' preference would substantially limit employment opportunities for women in the State.

Facially neutral action may, of course, violate the Equal Protection Clause if it perpetuates the effects of prior unconstitutional discrimination. This Court's

duced from the level selected by the legislature. Thus, a "less drastic" preference level will of necessity be less "effective," unless "effectiveness" is defined as what the court, rather than the legislature, deems to be the appropriate relative employment advantage for veterans.

decisions dealing with the obligation of school officials to dismantle dual school systems establish that much. See, e.g., *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15 (1971); *Alexander v. Holmes County Board of Education*, 396 U.S. 19 (1969); *Green v. County School Board*, 391 U.S. 430, 437-438 (1968); *Brown v. Board of Education*, 349 U.S. 294, 301 (1955). But this case does not present the problem of the perpetuation of prior unconstitutional discrimination.

It is by no means clear that the restrictions on women's participation in the military are unconstitutional. The Court has sustained at least one of the gender-based distinctions. See *Schlesinger v. Ballard*, 419 U.S. 498 (1975). If it were necessary to do so here, we would argue that the distinctions are consistent with the Constitution. As to Massachusetts, then, the military's use of gender is relevant to the case only to the extent that it supports the inference that the Massachusetts legislature realized that the primary beneficiaries of the veterans' preference would be men. Nor is there any reason to suppose that Massachusetts intended to discriminate against women by importing a discriminatory device into its employment selection procedures under the pretext of using a neutral selection method. Absent some showing of an intent to discriminate on that ground, there is no basis for holding that the gender distinctions in the military, even if impermissible, should

be sufficient to strike down a classification based on status as a veteran.³¹

Second, the veterans' preference is not a benefit conferred on a class that has been the clear beneficiary of prior official discrimination. In many respects, military gender distinctions operate to the disadvantage of men, not in their favor. Conscription extends only to men, and only men are sent into combat. Thus, all women in the military have entered the service voluntarily, while many men have not. We recognize, of course, that seemingly preferential treatment is not always benign, and that women as well as men may suffer because of gender distinctions in the military. Nonetheless, in significant respects, men have plainly been disadvantaged by the gender distinctions established by the military. The district court's assumption that the veteran's preference perpetuates a form of discrimination against women is therefore not altogether accurate.

³¹ The question whether restrictions on women's participation in the military violate the Constitution is, of course, not presented in this case. Although the Court has never directly passed on that question (cf. *Kahn v. Shevin*, 416 U.S. 351, 356 n.10 (1974)) the Court has noted that in the realm of military affairs, congressional determinations are entitled to particularly great deference by the courts, see *Schlesinger v. Ballard*, 419 U.S. 498, 510 (1975); *Toth v. Quarles*, 350 U.S. 11, 17 (1955); *Orloff v. Willoughby*, 345 U.S. 83, 95 (1953). We believe that in light of that principle and in light of the reasons for which most gender distinctions in the military have been devised, those distinctions would survive constitutional challenge.

II

**MASSACHUSETTS SHOULD HAVE BEEN ALLOWED
TO PROVE THAT ITS VETERANS' PREFERENCE
WOULD HAVE BEEN ADOPTED WHETHER OR NOT
IT HAD AN EFFECT ON THE EMPLOYMENT OP-
PORTUNITIES OF WOMEN**

Even if this Court should conclude that the Massachusetts veterans' preference statute amounted to intentional discrimination against women, it should not strike down the statute. The State should have an opportunity to show that the legislature would have enacted the veterans' preference even if it had no effect on women.

As this Court has pointed out on several recent occasions, proof that a particular statute or official action was motivated in part by an improper purpose does not necessarily require that the challenged action be invalidated. It merely shifts to the defendant the burden of establishing that the same action would have been taken even if the impermissible purpose had not been considered. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, *supra*, 429 U.S. at 270-271 n.21. If the defendant meets the burden, the plaintiff is not entitled to relief, since he "no longer fairly could attribute the injury complained of to improper consideration of a discriminatory purpose" (*ibid.*). See also *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 285-287 (1977); *Dayton Board of Education v. Brinkman*, 433 U.S. 406,

420 (1977); *Carey v. Phipps*, 435 U.S. 247, 260 (1978). Therefore, even if appellee is correct in her assertion that the veterans' preference constitutes intentional discrimination against women, she is entitled to a remedy only if the veterans' preference would not have been enacted if the purpose of discriminating against women had not been considered.

As Judge Murray noted, the district court did not find, and nothing in the record suggests, that the legislature would have refrained from adopting the veterans' preference if it knew that the effect on women could play no role in its decision. Indeed, in light of the court's suggestion that the Massachusetts legislature was simply indifferent to women's employment opportunities when it enacted the veterans' preference, it appears quite likely that the absence of injury to women would have made the veterans' preference at least as acceptable to the legislature, if not more so. Accordingly, even if the district court's finding of intent to discriminate against women is accepted, that finding would not necessarily justify the remedy ordered by the district court. The State should have an opportunity to show that the improper intent did not affect the decision, and only if the court finds against the State on that issue can it hold the statute unconstitutional.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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Solicitor General

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DECEMBER 1978

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FEB 9 1979

No. 78-233

In the Supreme Court of the United States

OCTOBER TERM, 1978

PERSONNEL ADMINISTRATOR OF
MASSACHUSETTS, ET AL., APPELLANTS

v.

HELEN B. FEENEY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

MOTION FOR LEAVE TO FILE and BRIEF OF THE
OFFICE OF PERSONNEL MANAGEMENT,
THE UNITED STATES DEPARTMENT OF DEFENSE,
THE UNITED STATES DEPARTMENT OF LABOR,
AND THE EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION AS *AMICI CURIAE*

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AND THE EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION FOR LEAVE TO FILE A BRIEF
AS *AMICI CURIAE*

The undersigned agencies move for leave to file the annexed brief *amici curiae* to bring before the Court certain considerations, not set forth in the briefs hitherto filed, which we believe will be of interest to the Court.

The Office of Personnel Management, which has assumed many of the functions of the Civil Service Com-

mission, manages federal employment operations and has the primary responsibility for development of policies governing federal civilian employment. Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1119-1120; Reorganization Plan No. 2 of 1978, 43 Fed. Reg. 36037 (1978). As the central federal personnel agency, OPM controls the examination and ranking of job applicants and implementation of the federal veterans' preference. It, therefore, has an interest in insuring that the decision in this case does not adversely affect the federal veterans' preference provisions. After reading all the briefs filed in this case, OPM believes that there is information available concerning the differences between the Massachusetts and the federal statute which is not contained in the briefs and which should be presented to the Court.

The Department of Defense carries out the constitutional responsibility of the Executive Branch to raise and support armies (Article I, Section 8, clauses 12 and 13). The Department has a direct interest in encouraging and rewarding service in the armed forces.

The Equal Employment Opportunity Commission and the Department of Labor have the major responsibility for enforcing federal statutes prohibiting discrimination on the basis of race or sex in employment. EEOC also has been charged with the "develop[ment] of uniform standards * * * and policies defining the nature of employment discrimination on the ground of race * * * [or] sex * * * under all Federal statutes * * * and policies which require equal

employment opportunity." Executive Order No. 12067, 43 Fed. Reg. 28967 (1978); see also Reorganization Plan No. 1 of 1978, 43 Fed. Reg. 19807 (1978). The Women's Bureau of the Labor Department is responsible for "formulat[ing] standards and policies which shall promote the welfare of wage-earning women." 29 U.S.C. 13. Thus, EEOC and the Department of Labor have an interest in the standards for proving purposeful employment discrimination. The Department of Labor also has the responsibility for a number of programs which provide special benefits to veterans.*

The undersigned agencies take no position on the validity of the Massachusetts veterans' preference statute. We believe, however, that important considerations concerning the differences between the federal and the state statute and the relevant proof requirements have not been adequately addressed in the briefs filed in this case. We, therefore, request permission to file a short brief *amici curiae* setting forth those considerations.

* 5 U.S.C. 8521 *et seq.* (Unemployment Compensation—Ex-Servicemen); 29 U.S.C. 49 *et seq.* (Wagner-Peyser Act); 29 U.S.C. 801 *et seq.* (Comprehensive Employment and Training Act of 1973); 38 U.S.C. 2001 *et seq.* (Job Counselling, Training and Placement Services for Veterans); 38 U.S.C. 2011 *et seq.* (Employment and Training of Disabled and Vietnam Era Veterans); 38 U.S.C. 2021 *et seq.* (Veterans' Reemployment Rights).

Respectfully submitted.

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I authorize the filing of this motion and the attached brief.

WADE H. MCCREE, JR.
Solicitor General

FEBRUARY 1979

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AND THE EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION AS AMICI CURIAE

INTEREST OF THE AMICI CURIAE

The Office of Personnel Management, the Depart-
ment of Defense, the Department of Labor, and the
Equal Employment Opportunity Commission wish to
present to the Court certain considerations, primarily

(1)

regarding the operation of the federal veterans' preference program, which, we believe, have not been fully addressed in the briefs of the parties and *amici curiae*.

The Office of Personnel Management, which has assumed many of the functions of the Civil Service Commission, manages federal employment operations and has the primary responsibility for development of policies governing federal civilian employment. Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1119-1120; Reorganization Plan No. 2 of 1978, 43 Fed. Reg. 36037 (1978). As the central federal personnel agency, OPM controls the examination and ranking of job applicants and implementation of the federal veterans' preference. The Department of Defense carries out the constitutional responsibility of the Executive Branch to raise and support armies (Article I, Section 8, clauses 12 and 13). The Department has a direct interest in encouraging and rewarding service in the armed forces. OPM and the Department of Defense, therefore, have an interest in insuring that the decision in this case does not adversely affect the federal veterans' preference provisions.

The Equal Employment Opportunity Commission and the Department of Labor have the major responsibility for enforcing federal statutes prohibiting discrimination on the basis of race or sex in employment. EEOC also has been charged with the "development] of uniform standards * * * and policies defining the nature of employment discrimination on the

ground of race * * * [or] sex * * * under all Federal statutes * * * and policies which require equal employment opportunity." Executive Order No. 12067, 43 Fed. Reg. 28967 (1978); see also Reorganization Plan No. 1 of 1978, 43 Fed. Reg. 19807 (1978). The Women's Bureau of the Labor Department is responsible for "formulat[ing] standards and policies which shall promote the welfare of wage-earning women." 29 U.S.C. 13. Thus, EEOC and the Department of Labor have an interest in the standards for proving purposeful employment discrimination.¹

The above agencies take no position on the validity of the Massachusetts veterans' preference statute. We believe, however, that there are important considerations concerning the difference between the federal and the state statute and the relevant proof requirements which have not been adequately addressed in the briefs previously filed in this case and which will be of benefit to the Court.

SUMMARY OF ARGUMENT

1. The national interest in compensating and rewarding veterans is different in quality and character from that of the states and would support the federal system of veterans' preference regardless of the decision in this case.

¹ Although under Section 712 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-11, veterans' employment preferences are expressly exempt from the proscriptions of Title VII, the EEOC has a substantial interest in the proof requirements for employment discrimination generally.

Furthermore, the Massachusetts absolute preference and the federal point preference are substantially different in both their operation and impact. Although each of the preferences adversely affects women, the federal preference is significantly less burdensome on women seeking higher level positions. The district court found that under the Massachusetts absolute preference, "[f]ew, if any, females have ever been considered for the higher positions in the state civil service" (A. 218). In contrast, studies done by the U.S. Civil Service Commission indicate that while the proportion of women hired is lower because of the federal veterans' preference, women nevertheless have constituted more than one-fourth of those hired for federal jobs requiring professional or administrative skills. Thus the federal point preference, which insures some measure of individual competition, is considerably less extreme in effect than Massachusetts' absolute preference.

2. Although the extent and form of veterans' benefits is a matter to be determined by the legislature, not every veterans' preference, no matter how irrational or extreme, must survive constitutional challenge. Even though such legislation unquestionably serves a legitimate goal, if an illicit motive was a factor in the means chosen to accomplish that goal, judicial deference is not required. Thus, the district court could properly consider whether the extreme form of preference chosen by Massachusetts had a bearing on the issue of improper motivation.

In some circumstances, the method chosen by the legislature may be so arbitrary and extreme in effect as to warrant a finding of discriminatory intent. The district court determined that Massachusetts' absolute preference fell within that category. Whatever the validity of the district court's view, it does not apply to the federal preference.

ARGUMENT

We think it important to point out that neither the federal, nor any other veterans' employment preference, is necessarily implicated with the Massachusetts scheme. Whatever the decision in this case, it will not determine the validity of the federal preference. As discussed in the brief for the United States, the federal government, acting pursuant to its constitutional responsibility to raise and support armies (Article I, Section 8, clauses 12 and 13), has a stronger and different interest than the states in encouraging and rewarding service in the armed forces—the goals of veterans' preference. (Brief for the United States as amicus curiae [hereafter U.S. Brief] at 34-35). The Court recognized in *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976), that "there may be overriding national interests which justify selective federal legislation that would be unacceptable for an individual State." Thus, in *Hampton*, the Court held that a challenged regulation excluding aliens from federal competitive civil service jobs required independent evaluation, even though the Court had earlier held a similar state provision

unconstitutional in *Sugarman v. Dougall*, 413 U.S. 634 (1973). See also *Mathews v. Diaz*, 426 U.S. 67 (1976) (unholding a federal statute which denied certain medicare benefits to aliens after striking a comparable state provision); cf. *Morton v. Mancari*, 417 U.S. 535, 555 (1974) (holding that Congress' "unique obligation" toward Indians justified an employment preference for Indians in the Bureau of Indian Affairs). Similarly, the compelling national interest in compensating veterans, which is different both in quality and character from that of Massachusetts, would in our view support the federal preference regardless of the decision here.

Not only are the governmental interests in veterans' legislation different, but the Massachusetts statute and the federal statute are also substantially different in their operation and impact. For the most part, the federal program relies on a point preference, thereby giving veterans some advantage over non-veterans who receive the same raw score on a civil service entrance examination. The Massachusetts statute, on the other hand, establishes an absolute preference, granting veterans priority over all other job applicants regardless of their comparative scores.²

² Although Congress has given disabled veterans first priority to certain jobs (5 U.S.C. 3313), and restricted certain unskilled jobs—those of guards, elevator operators, messengers and custodians—to veterans, if any apply (5 U.S.C. 3310; see U.S. Brief at 4), these preferences are limited in scope and justified by special considerations. The plight of disabled veterans and the nation's heightened obligation to

While there is no question that both statutes have a disparate impact on women (U.S. Brief at 6, 35), the federal statute has a less severe effect on women's opportunities for obtaining higher level positions. The district court found that the negative impact of the Massachusetts absolute preference on women is "dramatic": "[f]ew, if any, females have ever been considered for the higher positions in the state civil service" (A. 217, 218). Although 43 percent of those hired by the state from 1963 to 1973 were women, a large percentage of these were employed in lower paying, traditionally female jobs for which men did not apply or they were appointed under a defunct practice allowing requisition of only women for certain jobs (A. 197, 218, 263). The effect of the absolute preference is demonstrated in the 1975 Administrative Assistant eligibility list, which served as a pool for many state positions. As a result of the veterans' preference, the 41 women on the list lost an average of 21.5 places each while the 63 male veterans gained an average of 28 places each (A. 217). The district court found that "[i]f the list had been compiled without the Veterans' Preference, nearly 40% of the women would have occupied the top third of the list which is now occupied, with one

them warrant their special status. As to the few unskilled jobs for which veterans are given priority, it is reasonable to presume that veterans applying for such unskilled jobs are more in need of assistance.

exception [a female veteran], by men" (A. 217-18).³ Thus, as Judge Campbell recognized in his concurring opinion on remand, the absolute preference "makes it virtually impossible for a woman, no matter how talented, to obtain a state job that is also of interest to males. Such a system is fundamentally different from the conferring upon veterans of financial benefits to which all taxpayers contribute, or from the giving to them of some degree of preference in government employment, as under a point system, as a *quid pro quo* for time lost in military service" (A. 268-69).

Studies done by the U.S. Civil Service Commission indicate that the federal point preference is significantly less burdensome on women seeking higher level jobs. The "primary entry route" into professional and management level federal jobs is the professional and administrative career examination (PACE). *Veterans' Preference Oversight Hearings, Hearings Before the Subcommittee on Civil Service of the House Committee on Post Office and Civil Service,*

³ In his first dissent, Judge Murray noted that under the federal preference the first woman would have ranked 18th on the eligibility list and plaintiff would not have been reached until at least 31 names were certified. (A. 240 n.14). However, he incorrectly concluded that these women would not have been considered for a position by overlooking the fact that 43 positions held by provisional appointees could have been filled from the list (A. 77-78). See Brief for Appellee at 10 n.13. This demonstrates that as the number of vacancies increases, women have a greater chance of being considered under the federal system. Therefore, the impact on women of the federal point preference is much less predictable than Massachusetts' absolute preference.

95th Cong., 1st Sess. 4 (1977) (Statement of Alan K. Campbell, Chairman, U.S. Civil Service Commission). Of those who passed the examination in 1975, 41 percent were female, 37 percent were male non-veterans, and approximately 20 percent were veterans. Of those who were selected for employment, women constituted 27 percent and veterans 34 percent. Therefore, veterans improved and women correspondingly declined in position by 14 percent after addition of the veterans' preference. *Ibid.*⁴

At present, selection of employees is made from those persons who score within the top five percent. After the veterans' preference and "top-of-the-register" provisions⁵ are considered, women make up 29 percent of those in the top 5 percent. It has been estimated that without the preference provisions, they would constitute 41 percent of the top group—an increase of 12 percent. Statement of Chairman Campbell, *Veterans' Preference Oversight Hearings, supra*, at 4.⁶ Thus, while the federal veterans' prefer-

⁴ Although the veterans' preference provisions should also operate to disadvantage male nonveterans, they are in fact hired in numbers comparable to their share of those who pass the exam. Statement of Chairman Campbell, *Veterans' Preference Oversight Hearings, supra*, at 4.

⁵ 5 U.S.C. 3313 requires that disabled veterans be placed at the top of the eligibility list for certain jobs. See note 2, *supra*. Selection for a position must be made from among the three available persons highest on the eligibility list. 5 U.S.C. 3318(a).

⁶ The effect of the federal veterans' preference turns in part on economic conditions. Thus, the adverse impact on women is magnified at the present time because of large numbers of applicants and few vacancies.

ence has an adverse impact on women's job opportunities, women are not completely foreclosed from consideration and indeed constituted more than one-fourth of those hired in 1975 for jobs requiring professional or administrative skills.⁷

As the foregoing discussion indicates, the Massachusetts statute, by creating an absolute life-long preference throughout the civil service system, is one of the most extreme veterans' preference provisions. See Fleming & Shanor, *Veterans' Preferences in Public Employment: Unconstitutional Gender Discrimination?*, 26 Emory L.J. 13, 16-18 (1977); see also *Veterans' Preference Oversight Hearings*, *supra*, at 10-12. The federal point preference, which insures some measure of individual competition, is considerably less drastic. Indeed, the district court found that the existence of such effective less discriminatory alternatives⁸ supported its first conclusion that the

⁷ Despite this hiring ratio, women in federal employment, as in the private labor force, remain clustered at the bottom pay scales. Statement of Chairman Campbell, *Veterans' Preference Oversight Hearings*, *supra*, at 4. Cf. Brief *Amici Curiae* of the National Organization for Women, *et al.*, at 4 n.1. This, of course, is attributable only in part to the veterans' preference. Surveys by the Civil Service Commission and the General Accounting Office indicate that a revision of the preference would have a favorable impact on women in some circumstances, but not others, depending on their occupation. Statement of Chairman Campbell, *Veterans' Preference Oversight Hearings*, *supra*, at 4-5.

⁸ Although the degree of preference in the federal system is less, the federal program is considered highly successful and effective in meeting the goals set by the federal government, which has the primary responsibility for compensating vet-

absolute preference could not withstand constitutional scrutiny (A. 219-20) and its conclusion on remand that the statute was intentionally discriminatory (A. 265).

As the Solicitor General has stated, the extent and form of veterans' benefits is a matter for Congress and the state legislatures (U.S. Brief at 36-37). This is not to say, however, that any veterans' preference, no matter how extreme or irrational, must survive constitutional challenge.⁹ There is no question that the ultimate purpose of the Massachusetts statute and other veterans' preference legislation—to reward veterans—is legitimate. Even though legislation serves a legitimate purpose, however, an illicit

erans. See *Veterans' Preference Oversight Hearings*, *supra*, at 3. Veterans constitute approximately 50 percent of the federal service, while they make up only 25 percent of the national labor force. *Ibid.*

⁹ We do not believe that an employment preference is indistinguishable from other forms of veterans' benefits, such as educational benefits and loan programs, which are paid out of general tax revenues. Although an individual's interest in obtaining public employment is not fundamental, *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976), it is considered significant. See, e.g., *Board of Regents v. Roth*, 408 U.S. 564 (1972); Blumberg, *De Facto and De Jure Sex Discrimination under the Equal Protection Clause: A Reconsideration of the Veterans' Preference in Public Employment*, 26 Buffalo L. Rev. 3, 68-69 (1977). Moreover, the veterans' employment preference, unlike forms of financial benefits, places a particular burden on women seeking the opportunity for employment. Cf. *Nashville Gas Co. v. Satty*, 434 U.S. 136, 142 (1977) (distinguishing between a policy placing a burden on employment opportunities and one which merely denies women additional financial benefits).

motive may nevertheless have been a factor in the choice of means adopted to accomplish that goal. As the Court explained in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265 (1977), "[r]arely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern * * * When there is a proof that a discriminatory purpose has been a motivating factor in the decision * * * judicial deference is no longer justified." [Footnote omitted.] The statement in the brief for the United States that "when the district court found that the purpose of the veterans' preference statute was to aid veterans and not to injure women, that should have been the end of the matter" (U.S. Brief at 31-32), should be read in context: it was based both on the district court's finding that the prime objective of the Massachusetts statute was worthy (A. 254, 264) and also on the statement in its first opinion that the statute "was not enacted for the purpose of disqualifying women from receiving civil service appointments" (A. 212). However, the latter conclusion was made before the decision in *Washington v. Davis*, 426 U.S. 229 (1976), at a time when the court believed that a disproportionate impact alone was sufficient to require heightened scrutiny. It was not a considered finding on the complex question of illicit motivation. See Comment, *Veterans' Public Employment Preference as Sex Discrimination*, 90 Harv. L. Rev. 805, 810 n.45 (1977). Therefore, we do not believe that the brief of the United States is

contrary to our position that the district court could properly consider whether the extreme form of preference chosen by Massachusetts had a bearing on the issue of improper motivation (see U.S. Brief at 28-30).¹⁰ It is also significant that the Massachusetts statute is unlike other facially neutral laws because it directly incorporates the military's explicit gender-based classifications. That the discriminatory impact is therefore both foreseeable and "inevitable" (A. 260 n.7) does not in our view warrant heightened scrutiny of the statute, but it is a factor to be considered in determining the legislature's motivation.

As stated in the brief for the United States, insofar as the district court conclusively presumed a discriminatory purpose from the legislature's awareness of predictable disparate impact on women, it was in error (U.S. Brief at 18-19, 26). Foreseeable discriminatory effect is, however, probative evidence of a discriminatory purpose and in some contexts permits an inference of discriminatory intent, which shifts the burden of rebuttal to the state (U.S. Brief at 28-29). We believe that the degree of reasonableness in the legislature's choice of means is probative

¹⁰ The Court noted in *Village of Arlington Heights*, *supra*, 429 U.S. at 265 n.11, that "[l]egislation is frequently multipurposed: the removal of even a 'subordinate' purpose may shift altogether the consensus of legislative judgment supporting the statute" (quoting *McGinnis v. Royster*, 410 U.S. 263, 276-77 (1973)). See also Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 Sup. Ct. Rev. 95, 104 ("Every explicit or implicit distinction made by a law may have objectives.").

of intent, as is the existence of effective less discriminatory alternatives.¹¹ There is a point where the method chosen by the legislature is so arbitrary and extreme in effect as to warrant a finding of invidious intent. See *Washington v. Davis*, *supra*, 426 U.S. at 241-242 and 254 (Stevens, J., concurring); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (an extreme example in which the boundaries of Tuskegee were changed from a square to a twenty-eight-sided figure, excluding virtually all black voters). The district court concluded that Massachusetts' absolute permanent preference reached that point. Whatever the validity of the district court's view, we emphasize that, as discussed above, the decision does not require a finding that Congress was similarly motivated.¹²

¹¹ Professor Brest explains: "A conscientious decisionmaker * * * considers the costs of a proposal, its conduciveness to the ends sought to be attained, and the availability of alternatives less costly to the community as a whole or to a particular segment of the community. That a decision obviously fails to reflect these considerations with respect to any legitimate objective supports the inference that it was improperly motivated." Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, *supra*, 1971 Sup. Ct. Rev. at 121-122. See also Note, *Reading the Mind of the School Board: Segregative Intent and the De Facto/De Jure Distinction*, 86 Yale L. J. 317, 337-340 (1976). Cf. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975) (existence of an effective less discriminatory alternative is evidence that more burdensome means were chosen as a "pretext" for discrimination).

¹² The district court specifically noted that it was not passing on the validity of the federal provisions (A. 220).

Respectfully submitted.

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FEBRUARY 1979

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MICHAEL ROOAK, JR., CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

No. 78-233

PERSONNEL ADMINISTRATOR OF MASSACHUSETTS, et al.,
Petitioners

v.

HELEN B. FEENEY, *Respondent*

BRIEF OF AMICUS CURIAE,
THE WASHINGTON LEGAL FOUNDATION

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v.

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**BRIEF OF AMICUS CURIAE,
THE WASHINGTON LEGAL FOUNDATION**

**THE INTERESTS OF AMICUS CURIAE,
THE WASHINGTON LEGAL FOUNDATION, INC.**

The Washington Legal Foundation, Inc. (WLF) is a non-profit, tax-exempt corporation organized and existing under the laws of the District of Columbia for the purpose of engaging in litigation and the administrative process in matters affecting the broad public interest. WLF has more than 24,000 members, contributors and supporters throughout the United States whose interests the foundation represents.

WLF participates in and has devoted a substantial portion of its resources to cases relating to government regulations and constitutional law. WLF seeks to advance the interests of individuals such as veterans whose special problems deserve exceptional attention and protection by states and the Federal Government.

The Washington Legal Foundation can bring to this case a perspective not presently represented which may assist in obtaining full consideration of public interest issues. The present parties to this case are primarily concerned with the end results of this lawsuit. Neither party is focusing upon the constitutionality of Veterans' Preference Acts generally, WLF's sole concern in this case is to protect the present rights veterans possess in civil service employment.

There is more at stake in this case than the status of a Veterans Preference Statute in Massachusetts. Current and future employment prospects of countless thousands of veterans, both men and women, black and white alike across the United States may be adversely affected by the outcome of this case. WLF seeks to preserve the special status of veterans, a status a grateful nation has bestowed as a recognition of the heroic sacrifices made by members of the United States armed forces in protecting this nation.

ARGUMENT

I. EQUAL PROTECTION CHALLENGES BY WOMEN TOWARDS VETERANS' PREFERENCE ACTS SHOULD BE JUDGED BY A RATIONAL BASIS STANDARD

United States Supreme Court opinions in the twentieth century have articulated two major standards concerning use of the Equal Protection clause of the Fourteenth Amendment to overturn state laws.

The more traditional standard involves determining whether a law which allegedly violates the Equal Protection clause has some saving rational basis to it. This basis is linked to a legitimate public objective. The objective may not even have been the primary purpose behind the enactment of the challenged law.

As Chief Justice Warren observed:

"[T]he Fourteenth Amendment permits the states a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

McGowan v. Maryland, 366 U.S. 420, 425-26 (1961)

Under the rational basis standard, states have much discretion in fashioning classifications. A legislature may enact reforms gradually, *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955). Nor must classifications have an equal impact upon affected individuals. In this regard, the Supreme Court, 'over sixty-five years ago declared:

A classification having some rational basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality . . . [I]f any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.

Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911)

More recent restatements were expressed in *Williams v. Rhodes*, 393 U.S. 23, 30 (1968) and *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 55, (1973).

A classification found to be arbitrarily imposed, *McLaughlin v. Florida*, 379 U.S. 184, 190 (1964), a means to restrict a federal right, *Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960) or performing an unlawful end, *Yick Wo v. Hopkins*, 118 U.S. 356, 373-374 (1886), *Gomillion v. Lightfoot*, 364 U.S. at 347, will be deemed an Equal Protection violation.

The rational basis standard is considered currently in litigation involving state economic and social welfare legislation. It is the standard employed on laws restricting the availability of employment opportunities, *Dandridge v. Williams*, 397 U.S. 471, 485 (1970). This allows states to indulge in experiments concerning economic or social policy.

The second and more recent Equal Protection test involves strict scrutiny of laws regulating suspect classifications and fundamental interests. Only a compelling state interest can survive a strict scrutiny examination by the Court.

Fundamental interests include voting,¹ marriage,² interstate travel,³ procreation⁴ and criminal appeals.⁵

¹ *Reynolds v. Sims*, 377 U.S. 533 (1964); *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966).

² *Loving v. Virginia*, 388 U.S. 1 (1967).

³ *Shapiro v. Thompson*, 394 U.S. 618 (1969).

⁴ *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

⁵ *Griffin v. Illinois*, 351 U.S. 12 (1956).

Current suspect classifications include race, nationality and alienage.⁶

A. Alleged Gender Based Discrimination Is Not a Suspect Classification.

If it could be shown that gender was a suspect classification or that government employment was a fundamental right, upholding a preference law like Mass. Gen. Laws, Ch. 31, § 23, (the Act in dispute in this case) might be very difficult.

A plurality of the Supreme Court found sex to be a suspect classification in *Frontiero v. Richardson*, 411 U.S. 677, 689 (1973). However, a majority of the Court has never endorsed this.⁷

A statutory classification between men and women is subject to strict scrutiny, *Craig v. Boren*, 429 U.S. 190, 197 (1976) but the fact that the Massachusetts law does not classify by sex (both veterans and non-veterans can be of either gender) would make this rule inapplicable.

The court in *Koelfgen v. Jackson*, 355 F. Supp. 243, 250 (D. Minn. 1972), *aff'd mem.*, 410 U.S. 976 (1973), found no fundamental right under the constitution to government employment. This was emphasized in *Massachusetts Board of Retirement v. Murgua*, 427 U.S. 307, 313 (1976). A strict scrutiny standard will not be employed concerning state legislation involving the availability of employment per se, 427 U.S. at 313.

⁶ *Graham v. Richardson*, 403 U.S. 365 (1971).

⁷ *Regents of University of California v. Bakke*, — U.S. —, 98 S.Ct. 2733, 2755 (1978).

A number of courts, finding no strict scrutiny issue involving a Veterans' Preference Act, have upheld them by using the rational basis approach.

Koelfgen, involved a class action challenging the constitutionality of a Minnesota preference law much like the one in use in Massachusetts. Three different rationales were stated to justify this act, 355 F. Supp. at 251.⁸

An attack on the ten point bonus Pennsylvania Preference Statute by a female plaintiff was rebuffed through the use of the rational basis equal protection test, *Feinerman v. Jones*, 356 F. Supp. 252, 258-259 (M.D. Pa. 1973).

Branch v. DuBois, 418 F. Supp. 1128 (N.D. Ill. 1976), concerned an Illinois act which allowed many veterans preference points on police promotion tests. Plaintiff claimed sex discrimination as the effect of the examination resulted in no females ever having been promoted to sergeant, i.e. a disproportionate impact. Rational bases were detected which preserved the act, 418 F. Supp. at 1130.

Recently, a New Jersey court upheld the state's preference act against constitutional challenge by means of rational basis, *Ballou v. State Department of Civil Service*, 148 N.J. Super 112, 372 A.2d 333, 338-339 (App. Div. 1977), *aff'd*, 75 N.J. 365, 382 A.2d 1118 (1978).

In the 1970's the Supreme Court has decided several cases involving sex discrimination with an intermedi-

⁸ See pp. 13-14 of this amicus brief.

ate equal protection standard, although it has never been officially adopted. Gerald Gunther aptly calls this "newer equal protection with a bite." This standard mandates a government "to show a fair and substantial relationship between a challenged legislative classification and the objectives that the legislation was designed to achieve."⁹

The first case to employ this test was *Reed v. Reed*, 404 U.S. 71 (1971). It was followed by several decisions, including: *Kahn v. Shevin*, 416 U.S. 351 (1974), *Schlesinger v. Ballard*, 419 U.S. 498 (1975), *Weinberger v. Wisenfeld*, 420 U.S. 636 (1975), and *Stanton v. Stanton*, 421 U.S. 7 (1975). It appears that the District Court applied this standard in *Anthony v. Massachusetts*, 415 F. Supp. 485 (D. Mass. 1976) and *Feeney v. Massachusetts*, 451 F. Supp. 143 (D. Mass. 1978).

The effect of the new test is that a law which is discriminatory towards women and "is based on sex role stereotypes" will be struck down "unless the legislative classifications are remedial, compensating for the present effects of past or present discrimination."¹⁰

A restriction was made to this rule in *Geduldig v. Aiello*, 417 U.S. 484 (1974). Facially neutral statutes would be immune unless they are "mere pretexts" for sex discrimination.

Amicus suggests that the decisions in *Anthony* and *Feeney* should have been decided on the traditional

⁹ Note, *Veterans' Preference in Public Employment*, 44 Geo. Wash. L. Rev. 623, 635 (1976).

¹⁰ Note, *Veterans' Preference Statute which precludes women from Civil Service positions violates Equal Protection*, 23 Wayne L. Rev. 1435, 1440-1441 (1977).

rational basis standard as both were challenges to the Massachusetts Veterans' Preference Act.

Moreover, even if the stricter intermediate standard is the touchstone for decision, the *Anthony-Feeney* rulings should be rejected by the court.

The Massachusetts Act is facially neutral towards sex; both sexes, if veterans, are equally benefited. The act also lacks discriminatory intent, as the court itself admits in *Anthony*, 415 F. Supp. at 495, and *Feeney*, 415 F. Supp. at 145-146.

Therefore, the *Geduldig* restriction should be controlling and the Preference Act pass constitutional muster.

B. Invalidation of a State Veterans' Preference Statute on Equal Protection Grounds Requires a Discriminatory Intent, Not Discriminatory Impact.

The court in *Anthony* found that the Massachusetts Veterans' Preference Act has a "dramatic" negative impact on female hiring patterns. Although the law does not have a discriminatory or irrational end, the means selected by the Commonwealth (absolute Veterans' Preference) acts to prevent qualified women from obtaining civil service employment. The act benefits males due to years of extremely restricted female participation in the armed forces, 415 F. Supp. at 495, 497. Although required on remand to reconsider its decision in light of *Washington v. Davis*, 426 U.S. 229 (1976), the court reaffirmed its opinion in *Feeney*.

Amicus notes that the decision of *Davis* and its progeny leads to the conclusion that the standards involving discriminatory intent formulated by the District Court are erroneous.

Davis concerned a constitutional challenge to a literacy test used for employment purposes by the District of Columbia police department. Racial discrimination was alleged due to a negative impact on the hiring of blacks due to the test.

The Supreme Court in *Davis* held that to employ the strict scrutiny equal protection standard, a showing of discriminatory intent is required, 426 U.S. at 240.

In his opinion, Justice White opined:

Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another Nevertheless, we have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the constitution. Standing alone, it does not trigger the rule

426 U.S. at 242.

Also pertinent to the *Anthony-Feeney* impact standard is this warning from the *Davis* opinion:

A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far-reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that

may be more burdensome to the poor and to the average black than to the more affluent white.

426 U.S. at 248.

Senior District Judge Murray, who dissented in both *Anthony* and *Feeney*, stressed that *Davis* cannot be distinguished from *Feeney* in that the laws in both cases are facially neutral. Although the Massachusetts law had the heavier impact of the two, impact alone would not invalidate the legislation, 451 F. Supp. at 153.

In *Branch v. DuBois*, the court, in finding rational bases for a preference act, declared that the *Davis* holding was applicable to sex discrimination cases, 418 F. Supp. at 1132, 1133.

The Supreme Court, in *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 265 (1977) reaffirmed the *Davis* requirement of discriminatory intent. The Court continued:

Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstances and direct evidence of intent as may be available. The impact of the official action whether it—"bears more heavily on one race than another" . . .—may provide an important starting point. Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. . . . But such cases are rare. Absent a pattern as stark as that in *Gomillion* or *Yick Wo*, impact alone is not determinative, and the Court must look to other evidence.

429 U.S. at 266 [Footnotes omitted].

Three cases since *Davis* have all upheld Veterans' Preference Statutes against equal protection attack.

Legislative intent to discriminate against women or other groups was not found.¹¹

Amicus feel that there is insufficient evidence to demonstrate discriminatory intent by the Commonwealth of Massachusetts. Nor has it been convincingly demonstrated that the Preference Act, while facially neutral, has deliberately fostered sexual discrimination in job hiring.

Veterans' Preference laws aids veterans of both genders. Likewise, incidental negative aspects affect non-veteran men and women alike. Certainly, these laws may seem unfair to non-veterans, but that per se does not make them unconstitutional.

If it is felt that these laws should be changed, then the concept of federalism would dictate a remedy through state legislatures, not the federal courts.

States should be able to engage in social and economic experimentation without hindrance from "super-legislatures" except when fundamental rights or suspect classifications are involved—which is not the case with *Feeney*.

Legislatures have balanced divers interests when they have enacted laws concerning civil service hiring. They have expressed important reasoning for the preferential treatment of veterans. Such judgments should not be disturbed except for the most profound reasons.

¹¹ *Bannerman v. Department of Youth Authority*, 436 F. Supp. 1273 (N.D. Cal. 1977), *Branch v. DuBois*, *Ballou v. State Department of Civil Service*.

II. VETERANS' PREFERENCE ACTS HAVE A RATIONAL BASIS AND ARE CONSTITUTIONAL.

In the above section it has been demonstrated that the proper Equal Protection standard for alleged gender discrimination in Veterans' Preference statutes involves a rational basis.

Statutes having a non-discriminatory intent and a rational basis should be constitutionally upheld. Amicus suggests that the Preference Acts of Massachusetts and other states have valid rational purposes behind them.

A. The Purposes of Veterans' Preference Acts Are Remedial and Recognitional.

Veterans Preference Acts are but a small portion of legislative enactments conferring benefits. The notion of Veterans' Benefits is an ancient and nearly universal practice.

Land grants and pensions were employed by ancient Egypt, Babylonia, Greece, Rome, and the Aztecs in Mexico.¹ Pensions and homes for pensioners were developed in England and France.

In America, Veterans benefits have been provided since Plymouth Colony's Statute of 1636. The Continental Congress offered soldiers pensions during the Revolution. The Federal Government has concerned itself with veterans affairs since its inception.²

Currently, Federal Veterans' benefits include disability payments, hospital care, unemployment insur-

¹ T. Mosch, *The G.I. Bill* 107 (1975).

² S. Levitan & K. Cleary, *Old Wars Remain Unfinished* 7-8 (1973).

ance, reemployment rights, survivors' compensation, pensions, employment preference, housing and education ("GI Bill") subsidies.

States have developed Veterans' benefits programs as well. These include bonuses, burial benefits, lower standards for professional and occupational qualifications, license fee and real property tax exemption, state homes and hospitals and local and state government preference in hiring, promotion and reemployment.

Every state has some form of veterans' preference in hiring except Mississippi. There are a number of types of such hiring statutes. A generally discredited form involved absolute preference for Veterans without any level of qualifications. A form used in several states including Massachusetts requires Veterans who achieve a particular grade on an examination will obtain absolute preference regardless of the scores of non-veterans. Most states employ a point-bonus system whereby five or more points are compiled with the grade of a qualifying veteran. Disabled veterans are often given an extra five points.³

Several reasons have been articulated for creative Veterans' Preference Statutes.

The District Court in *Koelfgen v. Jackson*, 355 F. Supp. at 251 mentioned three rationales:

1. The State owes a debt of gratitude to those veterans who served the nation in time of peril. *State ex rel. Kangas v. McDonald*, 188 Minn. 157, 246 N.W. 900 (1933).

³ Blumberg, *De Facto and De Jure Sex Discrimination Under the Equal Protection Clause*, 26 Buffalo L.Rev. 3, 7-8 (1976-77).

2. A veteran is likely to possess courage, constancy, habits of obedience and fidelity, which are valuable qualifications for any public office holder. *Goodrich v. Mitchell*, 68 Kan. 765, 75 75 P.1034 (1904)
3. Veterans should be aided in rehabilitation and relocation because military service has disrupted their normal life and employment. Note, 26 Wash. & Lee L.Rev. 165 (1966).⁴

Another important motive appears to be a patriotic one. Providing employment preferences may encourage acts of military bravery in combat or enlistment into the armed forces.⁵

Legislatures often employ several of the above reasons when enacting veterans legislation. The Pennsylvania Veterans' Preference Act was based on the first two considerations mentioned in *Koelfgen, Feinerman v. Jones*, 356 F. Supp. at 259. The Commonwealth of Massachusetts has argued that:

Historical analysis makes it clear that the enactment of this legislation by the General Court was in no way motivated by a desire to discriminate against women. Rather, the legislative motivations for Massachusetts Veterans' Preference statutes were: (1) to reward those who have sacrificed in the service of their country; (2) to assist Veterans in their readjustment to civilian life; and (3) to encourage patriotic service.

Feeney v. Massachusetts, 451 F. Supp. at 149.

⁴ See also *Mitchell v. Cohen*, 333 U.S. 411, 418 (1948), *Johnson v. Robison*, 415 U.S. 361, 377 (1974).

⁵ *Opinion of the Justices*, 166 Mass. 589, 595, 44 N.E. 625, 627 (1896), *Hutcheson v. Director of Civil Service*, 361 Mass. 480, 281 N.E.2d 53, 57 (1972).

The common decision by states and the Federal Government (the Veterans' Preference Act of 1944)⁶ to use Veterans' Preference Acts demonstrates a strong desire to remedy many of the problems our veterans face as well as a recognition of the veterans' worth to society. This recognition is shown to veterans through legislative benefits. Every American is reminded of how much we owe our veterans by means of the proclamation, each November, of a Federal holiday called "Veterans' Day."

Amicus stresses that any of the above-mentioned rationales is adequate constitutionally. Patriotism concerns love of one's country and a determination to assist those who have fought and sacrificed for it. The skills and maturity obtained through military service should not be wasted. Nor should Americans forget the heavy economic physical and psychological costs entailed through being in the armed forces. Our veterans do not ask for favoritism but for an equal opportunity. Veterans Preference is a time-hallowed way to counteract various advantages enjoyed by non-veterans.

B. Veterans Deserve Preferential Status in State Civil Service Employment.

In the over two hundred years of this nation's existence, about 39,000,000 women and men have served in the American military. Of this number, over one million perished in the various wars America has fought to preserve its freedom.⁷

⁶ Act of June 27, 1944, ch. 287, 58 Stat. 387, 5 U.S.C. §§ 2108, 3309-12, 3316.

⁷ *Annual Report 1977*, Administrator of Veterans Affairs, Veterans Administration 1.

There are currently 29,844,000 living veterans of whom over 26,000,000 served during war time.⁸

While the veteran population expands, its composition changes. The number of black and other minority personnel has expanded rapidly in recent years. Women are increasing both their representation and responsibilities. Although their actual numbers are still low in comparison with the male total, women are now performing many previously all-male functions, such as serving aboard non-combat vessels. In short, one can no longer characterize the armed forces as a white, male preserve. Legislation aiding veterans therefore, has an impact of aiding minorities and women. Veterans preference may be in time, just another form of affirmative action.

The composition of our veteran population concerns more than race or gender. It involves an increasing number of senior citizens: 2,374,000 in 1977.⁹ Additionally, large numbers of veterans have been wounded or disabled in various degrees fighting for this country.

Veteran preference laws aid, not only ex-servicemen and women, but also their families. In fact, the number of people directly related to veterans benefits totals nearly 96,000,000 (or 44.1% of the American population).¹⁰

⁸ *Id.* at 1. Figures are as of September 30, 1977.

⁹ *Id.* at 3.

¹⁰ *Id.* at 3. This number breaks down as follows: 27,900,000 children under 18 years old; 11,300,000 other family members and children 18 and older; 22,800,000 spouses and 3,800,000 survivors of deceased veterans. Figures are as of September 30, 1977.

Numbers alone, however, do not express all the reasons behind the standard state practice of granting preferential treatment in civil service employment to veterans. Years of experience have demonstrated that extra efforts are needed to reorient the returning servicemen or women to the challenging environment of civilian life.

Veterans, after years of adjustment to military life, encounter after their discharge, special problems economically, socially and psychologically.

A serious and long standing problem is unemployment. The nature of modern warfare requires the mobilization of large amounts of civilians to serve in a nation's armed forces. This naturally leads to a large scale and often rapid demobilization upon the conclusion of hostilities. While the size of the armed forces shrink, domestic economies face declines in war-related employment and dislocations due to retooling industries for pressing civilian needs. Massive "dumping" of veterans on an already tight labor market can create severe unemployment with resulting political unrest. The history of the United States is no exception to this generalization.

America's first experience with large mobilizations occurred during the Civil War. Nearly two million Union veterans survived.

There were 4,700,000 veterans from World War One.¹¹ Those that were discharged ran into an economic slump in early 1919 and a full depression from 1920-21.¹² The onslaught of another depression in 1929

¹¹ S. Levitan & K. Cleary, *supra* note 2, at 9.

¹² T. Patten, Jr., *Public Policy Towards the Employment, Retirement and Rehabilitation of the "Old Soldier,"* 358 (June 1959).

also hit World War One veterans hard. Veteran discontent with high unemployment led to the unsuccessful Bonus March on Washington in 1932. Although some government attempts were made to obtain veteran employment (ten per cent of the members of the Civilian Conservation Corps were veterans), unemployment remained high until the outbreak of the Second World War.¹³

During the war, various estimates were projected demonstrating that the end of the war and demobilization would create millions of unemployed veterans.¹⁴ Fortunately, the American economy did not lapse into post-war depression. However, veteran unemployment continued above that of the general population. For example, 20 to 44 year-old veterans faced an unemployment rate of 14.9% in December 1945 and 8.8% two years later.¹⁵

Similarly, unemployment was higher among veterans of the Korean conflict than the general public. Their plight was not helped by a post-war recession.¹⁶

The Vietnam War veteran has encountered even more problems than his counterparts of the past. Those returning GI's found themselves heroes and awarded general recognition and esteem. The Vietnam veterans are different. They have not returned en masse but in rotated groups. They came home to a country with divided feelings as to the worthiness of the war. These

¹³ *Id.* at 344-346.

¹⁴ *Id.* at 358.

¹⁵ J. Helmer, *Bringing the War Home* 210 (1974).

¹⁶ P. Starr, *The Discarded Army* 203 (1973). In November 1954, 7.9% of returning veterans were unemployed.

veterans lacked the social prestige of their predecessors. The unpopularity of the War rubbed off on those who fought it. As a consequence, employers no longer sought them as eagerly as in the past.

The Vietnam veteran faced additional problems. Veterans had higher rates of mental illness, and drug addiction than the general population.¹⁷ Veterans were generally younger and less prone to have established skills than previous veterans. They were better educated and so less likely to seek menial jobs. Hence, competition for skilled jobs was high. More of them were minorities and women who were more vulnerable to discrimination.

Discrimination towards Vietnam Era Veterans has been widespread.¹⁸ This has adversely affected job prospects. In fact:

The unpopularity of the war places an additional burden upon the returning veteran. The young veteran finds himself referred to in print and in conversation as a dope addict or trained killer. Often his own peer group tells him what a fool he was to go to Vietnam in the first place. In his absence they have moved ahead in their life pursuits . . . "while the veteran . . . must start from the beginning as though his military service made no difference."¹⁹

Unemployment rates for Vietnam veterans have fluctuated along with the American economy of the

¹⁷ J. Helmer, *supra* note 15, at 62-63. A large number of studies on economic and psychological difficulties may be found in Staff of Senate Comm. on Veterans' Affairs, 93rd Cong., 2d Sess., *Source Material on the Vietnam Era Veteran* (Comm. Print 1974).

¹⁸ J. Helmer, *supra* note 15, at 229.

¹⁹ S. Levitan & K. Cleary, *supra* note 2, at 106.

1960's and 1970's. Yet, unemployment figures for veterans were, until recently, consistently above that of non-veterans.²⁰ The situation is still alarming for black and young veterans,²¹ as is the fact that vocational training in the armed forces has not aided in obtaining employment.²²

Amicus finds that the traditional bases for veterans preference acts should be supplemented by the needs of veterans for assistance in overcoming their current disadvantaged position in the American economy.

Preference for veterans in hiring allows for some mitigation in the often bleak employment outlook for the discharged service man and woman. Political attitudes towards our past involvement in Indochina have unfairly tarnished the once proud image of the veteran. Remedial action by states and the Federal Government can have the salutary effect of restoring the veteran's social prestige through gainful employment. Our collective responsibility towards the veteran should not end with discharge.

Amicus suggests that an analogy to a protected status for veterans may be found in judicial action upholding employment preference for Indians. The Supreme Court in *Morton v. Mancari*, 417 U.S. 535 (1974) denied a class action by non-Indian employees of the Bureau of Indian Affairs challenging Indian employ-

²⁰ J. Helmer, *supra* note 15, at 102.

²¹ The unemployment rate of 20-24 year old veterans in September 1977 was 20.1%. The rate for non-veterans was a "mere" 9.1%.

²² J. Helmer, *supra* note 15, at 222.

ment preference allowed by the Indian Reorganization Act.

The Court found that the Equal Employment Opportunities Act of 1972 had not repealed the Indian preference (nor has it repealed veterans preference).

In addition, Indian preference is not racially discriminatory and has a rational basis. Preference was "reasonably and directly related to a legitimate, non-racially based goal," 417 U.S. At 554.

Veterans preference laws are also designed with a non-racial (or sexual) aim in mind. Both laws may benefit those of a particular race the most, but this is only an indirect effect. Government has responsibilities for both veterans and Indians. The two groups have long received "particular and special treatment" from Congress. A preferential status is therefore one means of fulfilling legitimate legislative obligations.

CONCLUSION

Equal Protection challenges of sex discrimination against Veterans Preference Acts should be judged on a rational basis standard. This is a result of sex not being a suspect classification requiring strict judicial scrutiny.

As Veterans Preference Acts lack discriminatory intent and have several rational bases to support them, they are constitutional. Such bases include a natural desire to reward veterans for their sacrifices for America and to assist veterans by compensating for economic and physical losses sustained through military service. This Court must protect veterans' rights

by upholding the constitutionality of the Massachusetts
Veterans Preference Act.

Respectfully submitted,

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**In the
Supreme Court of the United States**

OCTOBER TERM, 1978

No. 78-233

**THE COMMONWEALTH OF MASSACHUSETTS, et al.,
APPELLANTS**

v.

**HELEN B. FEENEY
APPELLEE**

**On Appeal from the United States District Court for the
District of Massachusetts**

**BRIEF OF THE AMERICAN LEGION, AMICUS CURIAE,
IN SUPPORT OF APPELLANTS**

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In the Supreme Court of the United States

October Term, 1978

No. 78-233

THE COMMONWEALTH OF MASSACHUSETTS, et al.,
APPELLANTS

v.

HELEN B. FEENEY
APPELLEE

On Appeal from the United States District Court for the
District of Massachusetts

BRIEF OF THE AMERICAN LEGION, AMICUS CURIAE, IN SUPPORT OF APPELLANTS

Amicus has received and filed with the Clerk of this Court letters from counsel for Appellant and Appellee consenting to the filing of this Brief in support of Appellant.

Interest of Amicus

This brief is filed because the American Legion, as the representative of American veterans of war, has a vital interest in the outcome of litigation which may cost its members the benefits accorded them by the veteran's preference statute.

Statement of the Case

The amicus adopts the statement of the appellant.

Question Presented

1. Does the Veteran's Preference Statute, Mass. Gen. Laws ch. 31, §23, violate the equal protection clause of the Fourteenth Amendment to the Constitution of the United States?

Argument

I. AN INTENT TO DISCRIMINATE MUST BE PROVEN IN ORDER TO DEMONSTRATE A VIOLATION OF THE EQUAL PROTECTION CLAUSE.

This Court, in *Washington v. Davis*, 426 U.S. 229 (1976), clearly rejected the proposition that disproportionate impact on a class constitutes a violation of the equal protection clause. The action considered there was deemed to be facially neutral. Here, the challenged statute was held by the dissent and the concurring opinion, at least as an initial case, to be neutral on its face. *Feeney v. Massachusetts*, 451 F. Supp. 143, 152. (D. Mass. 1978) (Murray, D.J., dissenting); *id.* at 150 (Campbell, C.J., concurring.) Judge Tauro disagrees. *Id.* at 146-147. Examination of the statutory language demonstrates that the statute is not gender-based, but draws a distinction based only on past military service. Mass. Gen. Laws ch. 31, §§21-25. As Judge Murray recognized, “[t]he attempted distinction between the test in *Davis* and the statute here is totally unconvincing: one is no more neutral than the other. In each case the classification is facially neutral” *Id.* at 153 (Murray, D.J., dissenting). See also *Geduldig v. Aiello*, 417 U.S. 484 (1974) (classification based on pregnancy is not gender-based).

Since the statute is facially neutral, proof of a discriminatory purpose is necessary to demonstrate an equal protection violation. *Washington v. Davis*, 426 U.S. at 245. In this case, the plaintiff has the burden of demonstrating that in establishing and maintaining the veterans’ preference statute, the Massachusetts legislature was at least in part motivated by a purpose to disadvantage women. See *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265-266 (1977). The record developed in the lower court and discussed hereafter below demonstrates that the plaintiff has not met this burden, and the lower court erred in ruling in her favor.

II. THE LOWER COURT APPLIED AN INCORRECT STANDARD BY INFERRING INTENT FROM THE EVIDENCE PRESENTED.

A. *The Lower Court Erred In Its Reliance Upon a Foreseeable Consequences Test To Determine Intent To Discriminate.*

The lower court¹ in part based its inference of intent to discriminate on the principle that one is presumed² or deemed³ to intend the foreseeable consequences of actions taken.⁴

Although this question has not been specifically addressed by this Court, its application of the standard announced in *Washington v. Davis* indicates that such an inference of “intent” was not contemplated. In the *Arlington Heights* case, the zoning board’s decision had the inevitable effect of foreclosing the opportunities for racially integrated housing in the village. Not only was this a foreseeable consequence; it was an openly discussed and foreseen consequence. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 425 U.S. 252, 257-258 (1977). Despite these facts, this Court refused to infer a discriminatory intent, but found the other reasons put forward by the village ex-

¹ *Feeney v. Massachusetts*, 451 F. Supp. 143. (D. Mass. 1978).

² *Id.* at 146.

³ *Id.* at 147 n.7.

⁴ Several Courts of Appeal have applied a similar rule to infer segregative intent in the context of school desegregation suits. *United States v. Board of School Commissioners*, 573 F.2d 400 (7th Cir. 1978); *Arthur v. Nyquist*, 573 F.2d 134 (2nd Cir. 1978) (appeal pending); *United States v. Texas Education Agency*, 579 F.2d 910 (5th Cir. 1978); *United States v. School District of Omaha*, 565 F.2d 127 (8th Cir. 1977), *cert. den.*, 434 U.S. 1064 (1978); *N.A.A.C.P. v. Lansing Board of Education*, 559 F.2d 1042 (6th Cir. 1977); *cert. den.*, 434 U.S. 997 (1977). The cases all are inapposite; the context of racial segregation in the schools is distinguishable not only because sex classifications have never been subject to the same degree of scrutiny as racial classifications, but also because of the deference accorded legislative decisions and the particular federal-state relationship involved in this case. See discussion at Part IIA, *infra*. However, some of the same arguments suggesting that the use of a foreseeable consequences standard is erroneous in this case would be applicable in that context as well.

plaining the decision to be a sufficient basis for that decision. *Id.* at 269-270.

In *Regents of the University of California v. Bakke*, 98 S.Ct. 2733 (1978), a majority of this Court again indicated that a foreseeable effect was an insufficient basis upon which to infer discriminatory intent. In establishing that race could be a factor considered in medical school admissions procedures, the majority made a distinction between discrimination which is illegally, invidiously motivated and that which is based on remedial or compensatory motives. Thus, Justice Powell based his willingness to allow consideration of race as a factor on the good faith which he presumed motivated the admissions committee. *Id.* at 2763 (Powell, J.). Similarly, the four Justices who concurred in this part of the Court's judgment relied upon *Arlington Heights* in commenting that although admissions preferences might have a disproportionate adverse impact on, for example, German-American applicants, such impact would not support a constitutional claim "unless they could prove that [the admissions committee] intended invidiously to discriminate against German-Americans." *Id.* at 2784 n. 35 (concurring and dissenting opinion). Given the limited number of places for the large number of applicants, it was foreseeable that giving special consideration to one class would have an adverse impact on the chances of applicants not members of the class. A foreseeable consequences test would fail to distinguish between "good faith" and "invidious" motives for taking those actions and, therefore, would not be consistent with the rationale of *Bakke*.

The use of a foreseeable consequences test to determine legislative intent to discriminate is particularly inappropriate. This Court noted in *Arlington Heights*, 429 U.S. at 265-266, that it is difficult to determine the intentions of a legislative or administrative body. As developed in civil and criminal contexts, the foreseeable consequences test is used to determine the intent of natural persons; the inference is permissible when applied to natural persons because it is

rationally based upon common experience. *See generally Tot v. United States*, 319 U.S. 463, 467-468 (1943). When extended to legislative action, there is no such justification. To apply the standard to the legislature would stifle legislative creativity and would be entirely contrary to the traditional deference given legislative discretion and wisdom. As Judge Murray noted in his dissenting opinion in *Feeney*, "... considerations of federalism require that an impermissible motive in enacting state legislation be not lightly inferred." 451 F. Supp. at 155. Especially in areas relating to such distinctly state concerns as public employment, the courts must defer to the wishes and experience of the state legislature.⁵ If the law required legislators to ensure that its decisions would have no effect which burdened one group more than another, it would severely undermine legislative discretion.

Even if the Court rules that the legislature's ability to foresee adverse effects permits a presumption of intent to discriminate under some circumstances, such a presumption is inappropriate where the adverse effects are beyond the control of the state. The veterans' preference statute on its face does not draw a line between men and women; it draws the line between veterans and non-veterans. The fact that this classification does result in a disproportionate impact on women is caused completely by factors outside the control of the Massachusetts state government. It is the

⁵ *See National League of Cities v. Usery*, 426 U.S. 833 (1976) [special deference to matters relating to areas of state sovereignty such as public employment.] *See generally Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976) (*per curiam*); *City of New Orleans v. Dukes*, 427 U.S. 297 (1976) (*per curiam*); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *Anthony v. Massachusetts*, 415 F. Supp. 485, 502-503 (D. Mass. 1976) (Murray, D.J. dissenting), *vac'd and rem'd*, 434 U.S. 884 (1977).

Several veterans' preference cases especially note the prerogative of state legislatures in this area. *Rios v. Dillman*, 499 F.2d 329 (5th Cir. 1974); *Koelfgen v. Jackson*, 355 F. Supp. 243 (D. Minn. 1972), *aff'd mem.*, 410 U.S. 976 (1973); *McNamara v. Director of Civil Service*, 330 Mass. 22 (1953); Opinion of the Justices, 166 Mass. 594 (1896); *Hutcheson v. Director of Civil Service*, 361 Mass. 480 (1972). Cases involving alleged gender discrimination under the equal protection clause also specifically discuss the unique ability and prerogative of the legislature. *Kahn v. Shevin*, 416 U.S. 351 (1974); *Geduldig v. Aiello*, 417 U.S. 484 (1974).

federal government which placed whatever barriers may have existed against the entry of women into the armed services and against their participation in active combat; it was and is beyond the control or power of Massachusetts to change these barriers, as matters concerning the national defense are the exclusive province of the federal government.

A similar contention was confronted by this Court in *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86 (1973), where the plaintiff, a resident alien of the United States, claimed that a company policy against employment of aliens constituted a violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e et. seq., as discrimination on the basis of national origin. The Court rejected the plaintiff's contention that the prohibition against discrimination on the basis of national origin included a prohibition against distinctions made on the basis of citizenship. The Court also rejected the plaintiff's argument that discrimination on the basis of citizenship had the effect of discrimination on the basis of national origin. Of particular relevance here is the Court's comment in response to this argument:

It is suggested that a refusal to hire an alien always disadvantages that person because of the country of his birth. A person born in the United States, the argument goes, automatically obtains citizenship at birth, while those born elsewhere can acquire citizenship only through a long and sometimes difficult process. . . . The answer to this argument is that *it is not the employer who places the burdens of naturalization on those born outside the country, but Congress itself*, through laws enacted pursuant to its constitutional power "[t]o establish an uniform Rule of Naturalization." U.S. Const., art. I, §8, cl. 4.

Id. at 93-94 n.6 (emphasis added) (citations omitted). The Court reasoned that since the employer was not responsible for establishing the burdens which caused the dispropor-

tionate impact, the employer could not be held to be discriminating by its use of a policy with a foreseeable adverse impact on those born outside the United States.

This principle is equally applicable here. If a preference for veterans results in an adverse impact on women, it is not the state which placed this burden on women, but the federal government acting pursuant to its constitutional power to raise armies and generally provide for the national defense. U.S. Const. art. I, §8, cl. 1, 12. The foreseeability of that impact cannot be held against the state or against the veterans who have served their country.

B. *It Was Error for the Lower Court to Consider on the Issue of Discriminatory Intent a Lack of Relationship Between Job Performance and the Preference.*

One of the factors considered by Judge Tauro as part of the totality of circumstances relevant to discriminatory intent was that the veterans' preference was not related to performance on the job.⁶ The majority opinion does not articulate how this lack of relationship is relevant to discriminatory intent. It is true that the *presence* of a relationship between a classification and job performance would be relevant to show *lack* of discriminatory intent. It is also true that if the only purpose to be served by legislation was the highest quality of job performance, then the absence of a relationship between a classification and job performance would demonstrate that the legislature must have some improper motive such as an intention to discriminate. In this case it is conceded that the statutory preference was not designed merely to advance the goal of obtaining the best job performance. As the dissent forcefully points out, there are other desirable legislative goals including encouragement of enlistment. 451 F. Supp. at 152-156. The majority itself recognizes the worthy nature of the prime legislative motive of the challenged statute i.e., rewarding service in the military. 451 F. Supp. at 145. Since other legitimate motives to enact the veterans' statutes are conceded, the

⁶ The dissent notes that this contention is open to dispute, 451 F. Supp. at 154.

lack of relationship of the preference to job performance does not justify the inference of discriminatory intent. It was therefore error for the lower court to consider such a factor on the issue of intent.

C. *The Evidence of Discriminatory Impact Alone Cannot Support A Finding of Intent to Discriminate.*

The finding of discriminatory impact, although concededly probative of intent to discriminate, cannot alone support a claim that the equal protection clause has been violated. *Washington v. Davis*, 426 U.S. 229 (1976). Because there is no other evidence which proves an intent to discriminate, the lower court's reliance on the evidence of disproportionate impact cannot sustain its finding of discriminatory intent.

D. *The Totality of the Circumstances Surrounding the Veteran's Preference Statute Demonstrates that the Lower Court's Inference of Discriminatory Intent was Erroneous.*

The above analysis demonstrates that there is no evidence adequate to support the inference that there was a discriminatory intent behind the veterans' preference statute. In addition, the totality of the circumstances indicates the legislature's continued efforts to maintain the constitutionality of that statute. The evidence clearly demonstrates a non-discriminatory, legitimate policy behind the statute. The lower court admitted the praiseworthy purpose of the statute in its original opinion in this case:

Clearly, the rewarding of those who have rendered public service as members of the military is a worthy state purpose. . . . The modern Veterans' Preference Statute has its roots in legislation enacted in the seventeenth century and represents a key phase of the Commonwealth's continuing efforts on behalf of veterans. The program is designed to encourage service in the armed services, reward those whose lives have been disrupted because they have served, and provide assistance during the sometimes uneasy transition from military to civilian life.

Anthony v. Massachusetts, 415 F. Supp. 485, 496 (footnotes omitted).

Preferences and benefits to veterans in the areas of education, health care, housing and public employment, among others, have long been recognized as worthwhile endeavors of government.⁷ In the area of public employment alone, the federal government, every state⁸ and some municipalities⁹ provide some form of preference to veterans. These preferences concern the hiring, promotion or layoffs of veterans in public employment — or some combination of all three.

Moreover, other courts which have considered different forms of veterans' preferences articulate similar reasons of encouraging patriotism, rewarding and compensating for the disruption of military duty, rehabilitation and recognition of job qualifications acquired in military service.¹⁰ Each of the cases noted have either directly or indirectly overruled challenges to veterans' public employment preference statutes.

The history of the veterans' preference thus indicates a strong public policy supporting recognition of the services of our veterans and encouraging future military participation by members of both sexes. There is nothing in this his-

⁷ Kimbrough and Glen, *American Law of Veterans*, 1177-1238 (2d ed. 1954); House Comm. on Veterans' Affairs, *State Veterans' Laws*, H.R. Comm. Print No. 116, 93rd Cong., 2d Sess. (1974).

⁸ *Id.*

⁹ See e.g. *Rios v. Dillman*, 499 F.2d 329 (5th Cir. 1974) (El Paso, Texas).

¹⁰ Prior versions of the Massachusetts Veterans' Preference Statute have been rationalized in the following cases: *Stevens v. Campbell*, 332 F.Supp. 102 (D. Mass. 1971); *Brown v. Russell*, 166 Mass. 14 (1896); Opinion of the Justices, 166 Mass. 594 (1896); *Mayor of Lynn v. Commissioner of Civil Service*, 269 Mass. 410 (1929); *McNamara v. Director of Civil Service*, 330 Mass. 22 (1953); *Hutcheson v. Director of Civil Service*, 361 Mass. 480 (1972). See also *Mitchell v. Cohen*, 333 U.S. 411 (1948); *Koelfgen v. Jackson*, 355 F.Supp. 243 (D. Minn. 1972), *aff'd. mem.*, 410 U.S. 976 (1973); *August v. Bronstein*, 369 F.Supp. 190 (S.D.N.Y.), *aff'd. mem.*, 417 U.S. 901 (1974); *White v. Gates*, 253 F.2d 868 (D.C. Cir.) *cert. den.*, 356 U.S. 973 (1958); *Russell v. Hodges*, 470 F.2d 212 (2d Cir. 1972); *Rios v. Dillman*, 499 F.2d 329 (5th Cir. 1974); *Koch v. Yunich*, 533 F.2d 80 (2d Cir. 1976); *Carter v. Gallagher*, 337 F.Supp. 626 (D. Minn. 1971); *Feinerman v. Jones*, 356 F.Supp. 252 (M.D. Pa. 1973); *Branch v. DuBois*, 418 F.Supp. 1128 (N.D. Ill. 1976).

tory which indicates that the preference was even in part a pretext for disadvantaging women.

Moreover, the historical development of the statute reveals the continuing affirmative steps taken by the Massachusetts legislature to conform the statute with changing constitutional standards.¹¹ The legislative development indicates both the high public purpose which the legislature considers such preference to have and also of its resolve to preserve a constitutional statute. This demonstrated sensitivity to constitutional issues on the part of the Massachusetts legislature negates any inference that that body ever intended any discriminatory effect from its veterans' preference statute.

Thus, the lower court's inference of intent to discriminate is not justified by the totality of the circumstances, nor by any specific evidence pointing to a discriminatory intent.

¹¹ For example, chapter 501, §2 of the Acts of the Massachusetts legislature for 1895 provided that upon application for a civil service position and certification as a veteran, an individual was, without examination, to be placed first on the eligible list certified by the civil service commissioners for that position. *Brown v. Russell*, 166 Mass. 14 (1896), held that §2, insofar as it purported absolutely to give veterans particular and exclusive privileges, was not constitutional. That decision was rendered on April 25, 1896. No later than June 20, 1896, the Governor and Council of the Commonwealth requested the Supreme Judicial Court for an advisory opinion on the constitutionality of legislation already passed to remedy the infirmities of the Veterans' Preference Statute raised in *Brown v. Russell*.

More recently, the Supreme Judicial Court struck down that portion of the Veterans' Preference Statute which gave an absolute right for appointment to vacant civil service positions to disabled veterans who had successfully completed the civil service examination. *Hutcheson v. Director of Civil Service*, 361 Mass. 480 (1972). That case was filed with the Suffolk Superior Court on May 11, 1971 and the trial judge issued a Reservation and Report decision on July 2, 1971. Equity Docket No. 93429. While the case was being considered by the Supreme Judicial Court, the Massachusetts legislature passed an amendment to the Statute which removed the mandatory appointment language. Act of November 11, 1971, ch. 1051, 1971 Mass. Acts 1001. The amendment had an emergency declaration which was signed by the Governor on November 15, 1971 so that the act went immediately into effect.

In 1977, the legislature again displayed its sensitivity to constitutional standards. Subsequent to the passage of the Equal Rights Amendment to the Massachusetts Constitution, Mass. Const. pt. 1, art. 1 (1780, amended 1976), the legislature amended Mass. Gen. Laws ch. 31 §§23B, 24 to include only gender-neutral characterizations, e.g. "surviving spouse" instead of "widow." 1977 Mass. Adv. Legis. Serv. c. 815, §§1, 2.

That incorrect inference is the consequence of the lower court's incorrect interpretation of the intent test defined in *Washington v. Davis* and *Arlington Heights*.

III. SINCE THE CLASSIFICATION IMPOSED IS NEITHER "SUSPECT" NOR AN INFRINGEMENT OF A FUNDAMENTAL RIGHT, THE APPLICABLE CONSTITUTIONAL TEST IS WHETHER THERE IS A "RATIONAL BASIS" FOR THE LEGISLATIVE CLASSIFICATION, A BASIS WHICH CLEARLY EXISTS HERE.

Both *Washington v. Davis* and *Arlington Heights* recognize that proof of discriminatory intent does not conclusively establish unconstitutionality.¹² The fundamental question remains, does the challenged statute meet the applicable standard of review?

Because the statute discriminates only between veterans and non-veterans, the standard of review is only that of a rational relationship between the statute and its purpose.¹³ There is no fundamental right involved;¹⁴ nor does the statute create a suspect classification.¹⁵ It does not even constitute a classification based on sex because the classes created by the statute, i.e., veterans and non-veterans, both include men and women in their numbers.¹⁶

¹² *Washington v. Davis*, 426 U.S. at 241; *Arlington Heights*, 429 U.S. at 270 n.21.

¹³ Each member of the three-judge District Court panel which first heard this case agreed and acknowledged that, on its face, the Statute was not gender-based. *Anthony v. Massachusetts*, 415 F.Supp. 485 (D. Mass. 1976), *vac'd and rem'd*, 434 U.S. 884 (1977).

¹⁴ *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976) (*per curiam*) [no fundamental right to public employment]. Several veterans' preference cases have held that public employment is not a fundamental right which would trigger a review of strict scrutiny. *Koelfgen v. Jackson*, 335 F.Supp. 243, 250-251 (D. Minn. 1972), *aff'd mem.* 410 U.S. 976 (1973); *Feinerman v. Jones*, 356 F. Supp. 252, 258 (M.D. Pa. 1973).

¹⁵ A statute, neutral on its face, which allegedly affects one sex more adversely than the other does not create a suspect classification. See *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Craig v. Boren*, 429 U.S. 190 (1976). See also *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976); *Geduldig v. Aiello*, 417 U.S. 484 (1974).

¹⁶ See *Geduldig v. Aiello*, 417 U.S. 484 (1974); *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976) [construing Title VII of the Civil Rights Act of 1964]. In both these cases, the Court considered classifications based on pregnancy as non-gender based. *A fortiori*, a statute which creates classes containing both men and women does not create gender-based classifications.

As conceded by the lower court, the primary and worthy motive behind the veterans' preference statute was a desire to reward those who had devoted time to active combat participation in the military service.¹⁷ The legislature's decision to implement that goal by providing an advantage to veterans interested in public employment is well-suited and rationally related to the purpose of the statute. Since the preference does not guarantee public employment to all veterans regardless of competency nor absolutely deny non-veterans opportunities for employment in the civil service, it is not excessive but reasonably tailored to serve the statutory purpose. Therefore, there is a clear rational basis for the legislative classification adequate to withstand the scrutiny of this Court.

¹⁷ 451 F.Supp. at 145. See also 451 F.Supp. at 155-156 (Murray, D.J., dissenting). See also the discussion in Part II D of the Brief.

Conclusion

The judgment should be reversed.

Respectfully submitted,

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JAN 10 1979

RODAK, JR., CLERK

IN THE
Supreme Court of the United States

October Term, 1978

No. 78-233

PERSONNEL ADMINISTRATOR OF THE
COMMONWEALTH OF MASSACHUSETTS, *et al.*,
Appellants,

v.

HELEN B. FEENEY,

Appellee.

On Appeal from the United States District Court
for the District of Massachusetts

BRIEF AMICI CURIAE

OF

The National Organization for Women, NOW Legal Defense and Education Fund, The American Jewish Committee, Equal Rights Advocates, Inc., Federally Employed Women's Legal and Education Fund, League of Women Voters of the United States, National Federation of Business and Professional Women's Clubs, National Women's Political Caucus, Women's Equity Action League Educational and Legal Defense Fund, and Women's Legal Defense Fund

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Interest of Amici Curiae

This brief is filed on behalf of the National Organization for Women, NOW Legal Defense and Education Fund, The American Jewish Committee, Equal Rights Advocates, Inc., Federally Employed Women's Legal and Education Fund, League of Women Voters of the United States, National Federation of Business and Professional Women's Clubs, National Women's Political Caucus, Women's Equity Action League Educational and Legal Defense Fund, and Women's Legal Defense Fund, with the written consent of the parties as provided in Rule 42 of the Rules of this Court.

Each of these groups is a national organization interested in assuring equal opportunity and the equal protection of the laws for all citizens of the United States. They share a deep concern that the extreme form of veterans' preference challenged in this case constitutes invidious discrimination against women, erecting a virtually insurmountable barrier to equal opportunity for women in a significant range of government jobs and ensuring the perpetuation of past institutionalized discrimination against women.

Summary of Argument

I

This case is exceptional. First, the Massachusetts veterans' preference statute is not apiece with other laws measured by this Court against an equal protection yardstick, or with other forms of statutory preferences existing today, for while it may be neutral in form, it is not neutral in fact. It is inextricably tied to a system of explicit laws

and regulations classifying individuals on the basis of their sex, inevitably making the preference statute itself gender-based.

Second, this case is limited in scope to challenging the far-reaching, absolute, permanent preference granted by Massachusetts to veterans applying for public jobs. It presents the question whether there are any limits to how far a state may go in granting preferential employment opportunities to veterans at the expense of women.

II

The class of veterans is virtually all male as a result of gender-based laws and regulations which have severely limited opportunities for women to enter military service—an obvious prerequisite to obtaining veteran status. The structural impact of these gender-lines is incorporated in the Massachusetts veterans' preference statute, making the preferred class 98% male and creating an insuperable barrier to public employment opportunities for women. The challenged veterans' preference statute operates to heap additional economic disadvantages on a class that is defined by an immutable birth characteristic and already has been victimized by severe discrimination in the employment sector. Massachusetts' absolute, permanent veterans' preference statute is unavoidably sex-based, implicitly discriminating against women—not by operation of language but by operation of law.

Washington v. Davis is distinguishable, and should not be construed to require further proof of discriminatory intent in this case. Any pretense of neutrality should be

rejected because the challenged system is so firmly rooted in past and present discrimination and builds so conspicuously upon blind assumptions and stereotypes about women. Because the Massachusetts statutory preference incorporates *de jure* discrimination and reflects deeply imbedded traditional notions about women, proof of intent should not be required.

If, however, such proof is required here, the district court correctly concluded that it has been established. The court pointed to five objective factors indicating discriminatory intent—the facial non-neutrality of the statute; the history indicating the legislature's awareness of the devastating impact on women; the absence of any relationship between civil service job performance and the discriminatory gender-based military entrance requirements; the statistical evidence that the statute excludes women from a wide range of desirable civil service jobs; and the absence of any affirmative effort by the State to overcome this inevitable effect on women. The natural, foreseeable and inevitable effect of this law is a public workforce comprised of two distinct groups: men in the higher-grade, higher-paying policy positions, and women in the "pink collar ghetto" of lower-grade, lower-paid traditionally "female" jobs. This evidence securely satisfies the discriminatory intent requirement.

III

The gender-based classification inherent in the Massachusetts veterans' preference law is subject to the heightened standard of review developed by this Court in cases involving explicit gender lines. The challenged law fails to

withstand this review because it is not substantially related to the achievement of important governmental objectives. It is not sufficiently tailored to serve any of the objectives asserted by the State. The challenged law is too far sweeping to survive equal protection scrutiny.

ARGUMENT

I

Introduction

This case presents the Court with an opportunity to determine whether there are any constitutional limits to how far a state may go in granting preferential employment opportunities to one discrete group of individuals—veterans—at the expense of a second definable group—women—which has been victimized by a long and unfortunate history of pervasive discrimination in the employment sector.¹

In the context of public employment in Massachusetts, such sex-based discrimination has been blatantly imposed by a system which perpetuates the effects of laws and regulations severely limiting women's access to military service—an obvious prerequisite to obtaining status as a “veteran” and the accompanying preference for state government jobs. As a result, the Massachusetts public

1. There is ample evidence that the effects of this severe discrimination, already noted by this Court, *e.g.*, in *Frontiero v. Richardson*, 411 U.S. 677, 689 nn.22, 23 (1973), persist. In 1976, for example, the median income of women who worked full time was \$8,312, only 60% of the average earnings of men. U.S. Bureau of the Census, Current Population Reports, Series P-60, No. 107, *Money Income and Poverty Status of Families and Persons in the United States: 1976 (Advance Report)*, Table 7 (Sept. 1977). During that same year, veterans enjoyed a median income of \$12,830. Veterans Administration, *Annual Report Administrator of Veterans Affairs 1977*, 4.

workforce has two distinct classes of employees: one is male and occupies the higher-grade, higher-paying policy making positions; the other is female, and occupies the lower-grade, lower-paying positions, such as clerical jobs for which males either have chosen not to apply or which the state had considered (prior to 1971) as women's work. *Feeney v. Massachusetts*, 451 F. Supp. 143, 149 (D. Mass. 1978) (App. 263); Agreed Statement of Fact ¶20 (App. 79-80).

This case is exceptional in two important respects. First, the challenged Massachusetts veterans' preference statute is not apiece with any law previously measured by this Court against an equal protection yardstick.² At the purely semantic level, the Massachusetts statute is, perhaps, not gender-based; that is, the preference is not expressly granted to “men” only. But neither is the statute

2. Indeed, there may be no other instance today of a statutory preference similarly closed to a class of individuals, where eligibility for class membership is so inextricably tied to laws based on an immutable birth characteristic such as gender. The uniqueness of the preference challenged here is underscored by the analogies offered by the Solicitor General in his *amicus curiae* brief. If Massachusetts' extreme veterans' preference is rejected, the Solicitor General suggests, preferences for farmers (“overwhelmingly white and male”), poor persons (“proportionately more black and Hispanic”), former convicts (“predominantly male”) and the elderly (“unusually likely to be female”) would be implicated. Brief for the United States as *Amicus Curiae* at 21, 34. But *amici* are aware of no law which prevents anyone from being a farmer, a poor person, a convict, or from growing old. *Cf. Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313-314 (1976).

A more apt analogy would be the tying of current voter registration to prior voting eligibility, where such eligibility had been defined by law in a discriminatory way. The Court has struck down this type of arrangement in the past. *See, e.g., Guinn v. United States*, 238 U.S. 347 (1915). *See Fleming & Shanor, “Veterans' Preference in Public Employment: Unconstitutional Gender Discrimination?”* 26 *Emory L.J.* 13, 26 n.45 (1977).

gender-neutral in defining the preferred group in terms of criteria that men and women are equally capable of satisfying under law. *Anthony v. Massachusetts*, 415 F. Supp. 485, 498 (D. Mass. 1976) (App. 219). The legal impediments to women qualifying as "veterans" must be read into the term itself. If the statute is neutral in form, it is not in fact. By operation of law, it is gender-based.

A second prominent feature of this case is its limited scope. The broadly-operative, absolute, permanent employment preference granted to veterans by Massachusetts is the sole focus of Helen Feeney's challenge and the holding of the district court. *Feeney v. Massachusetts*, 451 F. Supp. at 145, 150 n.16 (App. 255, 265). Less extreme employment preferences are not at issue,³ nor are other forms of veterans' benefits, such as loans, pensions and educational benefits.⁴

3. The Solicitor General's effort to group other types of veterans' employment preferences as implicated with the Massachusetts scheme is not persuasive. Brief for United States as *Amicus Curiae* at 2. Statutory preferences which grant additional points to veterans' scores and/or provide a time limit for exercising the preference are far less sweeping than the Massachusetts system. *Anthony v. Massachusetts*, 415 F. Supp. at 499 (App. 219-220). Narrowly focused positional preferences like those granted by the federal government to disabled veterans, 5 U.S.C. §3313 (1970), and/or for a limited number of relatively low-level positions, 5 U.S.C. §§3310 (guards, messengers, elevator operators, custodians), 3313 (lower grades in federal civil service) (1970), similarly are distinguishable from the Massachusetts law, which effectively bars at least 98% of the State's women from the most desirable civil service jobs. See *Anthony v. Massachusetts*, 415 F. Supp. at 498 (App. 218-219). Cf. *Feinerman v. Jones*, 356 F. Supp. 252, 259-60 (M.D. Pa. 1973) (citing Pennsylvania Supreme Court case which sustained moderate veterans' preferences but invalidated those found excessive).

4. These benefits also are plainly distinguishable. Most notably, unlike the Massachusetts public employment preference, the cost of these benefits is widely shared by the entire tax paying public. They

(footnote continued on next page)

This Court grappled last term in *Regents of University of California v. Bakke* with the "serious problems of justice connected with the idea of preference itself." 98 S.Ct. 2733, 2752-53 (1978). Mr. Justice Powell noted the "measure of inequity in forcing innocent persons . . . to bear the burdens of redressing grievances not of their making." *Id.* at 2753. Helen Feeney and other Massachusetts women should not be forced to bear the devastating burden of the extreme preference here.

Sensitivity to the claims of women to fair treatment at the hands of the government, and application of the standard of review for gender-based classifications developed by this Court, require the conclusion that the Massachusetts law violates the Fourteenth Amendment's guarantee to all persons of the equal protection of the laws. By effectively denying employment opportunities to women who have had virtually no opportunity to enter military service and thereby qualify as veterans, the Massachusetts absolute, permanent veterans' preference goes too far to pass constitutional muster.

do not place a disproportionate burden on an identifiable class of individuals—women—which has already been disadvantaged in employment by a lengthy history of severe and pervasive discrimination. See Blumberg, "De Facto and De Jure Sex Discrimination under the Equal Protection Clause: A Reconsideration of the Veterans' Preference in Public Employment," 26 *Buffalo L. Rev.* 1, 9 (1976-1977). Cf. *Regents of University of California v. Bakke*, 98 S. Ct. 2733, 2756 (1978) (distinguishing preferences which result in a "denial of the relevant benefit" from those which do not).

II

The Massachusetts veterans' preference statute discriminates on the basis of gender.

- A. Because of laws and regulations limiting the eligibility of women for participation in the military, the Massachusetts veterans' preference statute prefers a class that is overwhelmingly male.**

The Massachusetts veterans' preference statute grants veterans an absolute and permanent preference for a significant portion of the State's civil service positions.⁵ Mass. Gen. Laws c.31, §23 (1971). Once a veteran demonstrates a certain minimum competence, he goes directly to the top of the list of those eligible for these state jobs, each and every time. In some cases, a new examination is given during the life of the "eligibles" list (App. 75). If any new veterans are added, they too are placed at the top of the list, pushing even further behind any non-veterans who may have scored higher on job-related criteria (App. 75). This is true even though the non-veteran applied and qualified earlier for the job.

The class of individuals benefited by the Massachusetts preference is defined in a way that inevitably makes it overwhelmingly male. This reality is not the *de facto* result of any random or impartial method of selection, but is the inherent and inescapable consequence of the fact that veteran status can be acquired in only one way: service in the nation's armed forces. The Massachusetts selection formula for government employees therefore is inexorably

5. Approximately 60% of all positions in the Massachusetts government are subject to the veterans' preference law (App. 71-72).

tied to *de jure* federal discrimination against women in the military. *Feeney v. Massachusetts*, 451 F. Supp. at 145 (App. 254).

Women's participation in the military has been severely limited throughout American history. *See generally* M. Binkin and S. Bach, *Women and the Military* 4-21 (1977). Prior to 1942, except for the enlistment of approximately 10,000 women in the Navy during World War I, women were allowed in the military only as nurses (App. 84). During most of the post-World War II period, women have been limited to a maximum of two per cent of all armed forces personnel.⁶ Women are still limited by regulation to no more than two per cent of Army personnel. 32 C.F.R. §580.4(b) (1977). In addition, until 1975 women were excluded entirely from the military academies. Pub. L. No. 94-106, 89 Stat. 538 (1975) (amending 10 U.S.C. §§4342, 6954, 6956 and 9342).

Entrance qualifications have remained more stringent for women than for men. In some branches of the armed services, women still face higher minimum age standards⁷

6. *See, e.g.*, 10 U.S.C. §§3209(b) (limiting the Army's female commissioned officers to no more than two per cent of their male counterparts), 3215(b) (Army female enlisted members), 8208(a) (Air Force female commissioned officers) (1959). These sections were amended November 8, 1967, to repeal mandatory limits and to authorize the respective Secretaries to prescribe limits on female personnel. 10 U.S.C. §§3209(b), 3215(b), 8208(a) (Supp. 1978).

7. *See, e.g.*, 32 C.F.R. §571.2(a)(1), (2), (7) (1977) (Army minimum age limits of 18 for men (17 with parental consent) but 21 for women (18 with parental consent)); 32 C.F.R. §888.5(a) (1977) (same gender-based differential for Air Force, except that where state law sets the age of majority at less than 21, no parental consent is required for a woman over 18 who has reached majority). These differentials persist in the regulations despite the enactment in 1974 of a law equalizing enlistment age requirements for men and women. 10 U.S.C. §505(a) (1975).

and higher educational requirements.⁸ Women, but not men, are ineligible for the Army if they have responsibility for the care of a child under the age of eighteen, 32 C.F.R. §571.2(d)(4) (1977), or if they are married, 32 C.F.R. §571.2(f)(4)(i) (1977).

While this Court has not yet been called upon directly to decide the constitutionality of legislative and regulatory classifications excluding women from a wide range of career and service opportunities in the military, the structurally discriminatory impact of such classifications—which is the only matter we seek to establish here—has been recognized. See *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975). See generally M. Binkin and S. Bach, *Women and the Military* 1-21 (1977).

In 1978, the District Court for the District of Columbia invalidated on equal protection grounds legislation which excluded Navy women from assignment to sea duty on vessels other than hospital ships and transports.⁹ *Owens v. Brown*, 455 F. Supp. 291 (D.D.C. 1978). Judge Sirica described the provision as “effectively plac[ing] a ceiling on the level of female recruitment by the Navy,” and noted that “[t]he practical effect of this limitation is that a disproportionately small number of women will have the opportunity to embark upon a career whose successful

8. See, e.g., 32 C.F.R. §571.2(c)(1), (2) (1977) (Army has no general minimum educational requirement for males, but requires female applicants without prior service to be high school graduates or pass an equivalency test).

9. The government's failure to perfect an appeal from *Owens v. Brown* (for which the time has expired) casts some doubt on the assertions in the Solicitor General's brief that the government believes gender-based distinctions in the military are constitutional. Brief for United States as *Amicus Curiae* at 19-20, 38, 39 n.31.

completion carries with it numerous and economically significant veterans' benefits and preferences.” 455 F. Supp. at 295.

Regardless of the outcome of such direct challenges to gender-based classifications excluding women from the military, there is no justification for the incorporation of these gender lines in the Massachusetts public workforce. See pp. 24-25, *infra*. Any assertion of “Congress' broad discretion in the realm of military affairs”, Brief for United States as *Amicus Curiae* at 19-20, cannot be extended to permit these gender distinctions to spill over into the civil sector. To the contrary, “[a] *cordon sanitaire* should be drawn around the armed forces' utilization of sex-based classifications.” Blumberg, *supra*, 26 *Buffalo L.Rev.* at 51.

Instead, the gender distinctions in federal military laws and regulations combine with the Massachusetts veterans' preference law to create an insuperable barrier to women seeking to break out of traditional roles in the civil sector. Because of the gender lines restricting access to military service, the individuals who qualify for the absolute and permanent veterans' preference comprise a class that is indisputably more than 98% male. Agreed Statement of Facts ¶31 (App. 83).¹⁰ The result is the relegation of

10. The lack of 100% identity between the classification “veteran” and “male” does not negate its gender-bias. Appellants' reliance on this Court's treatment of pregnancy in *Geduldig v. Aiello*, 417 U.S. 484 (1974), Brief for Appellants at 33-35, is misplaced, for *Aiello* does not require or even offer support for the conclusion that the Massachusetts law is “gender neutral.” See *Anthony v. Massachusetts*, 415 F. Supp. at 495 n.8 (App. 212-213).

In contrast to *Aiello*, where it was determined that no class was disadvantaged at all (417 U.S. at 496-97), here a large advantage in employment opportunities to a virtually all male class has been

(footnote continued on next page)

virtually the entire class of females seeking Massachusetts state jobs to "inferior legal status without regard to the actual capabilities of its individual members." *Frontiero v. Richardson*, 411 U.S. at 687.

B. The Massachusetts veterans' preference statute invidiously discriminates against women.

1. The challenged statute implicitly discriminates against women, and further proof of discriminatory intent should not be required to trigger equal protection scrutiny.

In context, the classification "veterans" in the Massachusetts absolute, permanent preference statute is unavoidably sex-based. The classification inevitably discriminates deeply and pervasively against women as a result of a congeries of laws, regulations and practices which define as overwhelmingly male the class of individuals who qualify as

demonstrated beyond peradventure. *Anthony v. Massachusetts*, 415 F. Supp. at 495 n.8 (App. 212-213); Fleming and Shanor, *supra*, 26 *Emory L.J.* at 31-32. At least ninety-eight per cent of all Massachusetts women are excluded from this class. See *Anthony v. Massachusetts*, 415 F. Supp. at 498 (App. 218-219). Dissenting Judge Murray computes the percentage of excluded women at 99%. *Id.* at 504 n.5 (App. 232).

Further, this Court has recognized more than a "semantic" distinction between the benefits involved in pregnancy disability plans and the deprivation of employment opportunities in issue here. See *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977). Notably, where the different treatment of pregnant women places a burden on employment opportunities, even that classification has been understood to be gender-based. *Id.* at 142.

Finally, this Court's view of pregnancy as a unique "physical condition", *Aiello*, 417 U.S. at 496 n.20, and as temporary, voluntary and desired, *General Electric v. Gilbert*, 429 U.S. 125, 136 (1976), has no application to the classification here. The almost total exclusion of women from the preferred class, mandated by gender-based military laws and regulations, is not voluntary, desired, or temporary, nor is it related to any unique physical condition.

veterans. Cf. *Lane v. Wilson*, 307 U.S. 268 (1939) (neutral voter registration statute automatically registering voters in 1914 election found to be discriminatory because of laws preventing blacks from voting in 1914); *Guinn v. United States*, 238 U.S. 347 (1915) ("grandfather clause" discriminatory because of prior laws prohibiting blacks from voting); Tribe, *American Constitutional Law*, §16-16 (1978) (citing, *inter alia*, *Reitman v. Mulkey*, 387 U.S. 369 (1967)).

This Court's holding in *Washington v. Davis*, 426 U.S. 229 (1976), should not be extended here to impose an additional burden on appellee to establish further proof of discriminatory intent. That case dealt with a facially neutral testing procedure challenged as racially discriminatory because of its disparate effect on black applicants; there was no allegation or proof of any intent to discriminate. *Id.* at 235. Racially disproportionate impact, standing alone and without regard to whether it reflects a racially discriminatory purpose, was found insufficient to render the official act unconstitutional or even to trigger strict scrutiny. 426 U.S. at 239. The test assailed was not found to be "culturally slanted to favor whites." *Id.* at 235 (citing the lower court's opinion). This Court found no discrimination in the test itself, its purpose or its administration.

The Massachusetts veterans' preference statute differs significantly from the testing procedure in issue in *Washington v. Davis*. The statute challenged here is not neutral in design or operation. The group of individuals granted exclusive preference is inextricably tied to and necessarily controlled by decades of intentional explicit gender-based

discrimination in the armed forces.¹¹ This discrimination has been described as "worse than that in *Washington* While in *Washington*, blacks were kept off the police force by low test scores reflecting a pervasive educational disadvantage, here women were denied jobs because they did not have a status that they had been prevented by law from obtaining." L. Tribe, *American Constitutional Law* 101 (1979 Supp.) (discussing *Feeney*).

The Massachusetts veterans' preference statute thus bears scant resemblance to a genuinely neutral statute, for it is rooted in, builds upon and exacerbates past and present discrimination. To attempt to force this statute into rigid categories of either explicitly biased classification or facial neutrality would deny reality. This Court has long recognized the difficulties inherent in forcing constitutional analysis into strict ritualistic categories. See *Vlandis v. Kline*, 412 U.S. 441, 458 (1973) (White, J., concurring).

The Massachusetts veterans' preference statute, by incorporating *de jure* discrimination into its superficially neutral classification of veterans, constitutes invidious discrimination with only a gossamer veil. Only by ignoring the inevitable impact of the laws, regulations and practices which effectively define the class "veterans" as "male" can any illusion of neutrality be maintained. This Court has pierced such illusions in the past, see *Lane v. Wilson*, 307 U.S. at 275-276; *Guinn v. United States*, 238 U.S. at 364, and should do so again here.

11. The District Court appropriately considered the effects of the federal laws on the state system. See Blumberg, *supra*, 26 *Buffalo L. Rev.* at 49-51. Cf. *Gaston County v. United States*, 395 U.S. 285 (1969) (evidence that county deprived blacks of equal educational opportunities may be considered for effect on state literacy test).

The pretense of neutrality should be rejected particularly where, as here, the incorporated discrimination rests on blind assumptions and stereotypes about women. As this Court has recognized, classifications by gender are often based on pernicious role-typing of women and serve to perpetuate rigid, out-moded stereotypes. See *Craig v. Boren*, 429 U.S. 190, 198-99 (1976); *Stanton v. Stanton*, 421 U.S. 7, 14-15 (1975); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 651-53 (1975); *Schlesinger v. Ballard*, 419 U.S. 498, 507 (1975). The same repressive role-typing is evident here.

The pattern of excluding women from the military is deeply rooted in the "traditional way of thinking about women." *Owens v. Brown*, 455 F. Supp. 291, 306 (D.D.C. 1978). It is based upon "overbroad generalizations," *Schlesinger v. Ballard*, 419 U.S. at 507, about the "traits, behavior and capabilities of the different sexes." *Owens v. Brown*, 455 F. Supp. at 308. The absolute preference granted by Massachusetts to veterans guarantees the perpetuation of these stereotypes. It translates the exclusion of women from military employment opportunities into a similar foreclosure of civil merit system jobs, "seiz[ing] upon a group—women—who have historically suffered discrimination in employment, and rely[ing] on the effect of this past discrimination as a justification for heaping on additional economic disadvantages." *Frontiero v. Richardson*, 411 U.S. at 689 n.22.

Further, gender-based assumptions must be understood to underlie any asserted legislative indifference to the disparate impact of the veterans' preference on women workers. The Massachusetts legislature could ignore this impact only by accepting traditional notions about women's employment (e.g., that women do not work "outside the home")

and are "unsuited" for certain jobs), and women's economic needs (e.g., that their needs are "satisfied by male relatives"). See *Blumberg, supra*, 26 *Buffalo L. Rev.* at 54. Indeed, the Massachusetts legislature's reliance on such notions is seen clearly in the early preference legislation which allowed for separate requisitioning of women to fill certain positions, and which operated "to preserve stereotypically 'female' clerical jobs for women." *Feeney v. Massachusetts*, 451 F. Supp. at 148 n.9 (App. 260-261). These same provisions permitted appointing authorities to specify the certification of all male lists for other jobs. See Exhibits 64-79, as referred to in ¶21 of the Agreed Statement of Facts (App. 80-81) (job notices specifying vacancies for males). By authorizing such gender-based designations, the legislature codified the assumptions that the occupational spheres of men and women should be separate and segregated according to sex and that there are certain jobs for which men are ill suited and women eminently suited, such as typist, file clerk or charperson. See *Blumberg, supra*, 26 *Buffalo L. Rev.* at 54.

Because such assumptions and stereotypes are so deeply imbedded in our society, requiring proof of legislative intent to discriminate against women might leave many statutes intact, even though they effectively and purposefully differentiate on the basis of sex. See *Craig v. Boren*, 429 U.S. 190 (1976); cf. *Taylor v. Louisiana*, 419 U.S. 522 (1975). As Mr. Justice Stevens has stated: "[A] traditional classification is more likely to be used without pausing to consider its justification than is a newly created classification. Habit, rather than analysis, makes it seem acceptable and natural to distinguish between male and female" *Mathews v. Lucas*, 427 U.S. 495, 520 (1976) (Stevens, J., dissenting).

Indeed, this Court has never required plaintiffs to show that the legislature *intended* to discriminate against women in passing gender-based laws. See *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Craig v. Boren*, 429 U.S. 190 (1976). These gender-based discrimination cases were decided by this Court after *Washington v. Davis* and considered statutes with explicit sex-based classifications. However, the pretense of neutrality in the Massachusetts veterans' preference scheme should not be relied upon to reach a different result, for the statute builds so conspicuously on blind stereotypes and past and present discrimination that it cannot be labelled neutral. Cf. *Gaston County v. United States*, 395 U.S. 285 (1969); *Lane v. Wilson*, 307 U.S. 268 (1939). Further proof of discriminatory intent should not be required.

2. If further proof of intentional discrimination is required, the district court correctly held that such requirement has been satisfied.

If this Court construes *Washington v. Davis* to require that further proof of intentional discrimination be demonstrated here, this requirement has been satisfied. As this Court recognized in *Washington v. Davis*, such discriminatory purpose need not appear on the face of the statute. 426 U.S. at 241. "Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts" *Id.* at 242. The court below correctly considered "the totality of the circumstances" and determined that Massachusetts had acted intentionally. *Feeney v. Massachusetts*, 451 F. Supp. at 146 (App. 257). It pointed to five factors which, taken together, were sufficient to establish intentional discrimination against women.

First, the court noted that "[t]he factual underpinning in this case is entirely different [from that in *Washington*]

v. *Davis*] [T]he Veterans' Preference Statute is 'anything but an impartial, neutral policy of selection with merely an incidental effect on the opportunities for women.' " *Feeney v. Massachusetts*, 451 F. Supp. at 147 (App. 259) (citing *Anthony v. Massachusetts*, 415 F. Supp. at 495 (App. 212)). This Court has recognized that the non-neutrality of selection procedures is probative of discriminatory intent. *Washington v. Davis*, 426 U.S. at 241.

Second, the district court examined the history of the statute, and concluded that the legislature must have been cognizant of its impact on women. In particular, it looked to an earlier enactment which provided for requisitioning only female applicants for certain positions. These requisitions were exempted from the operation of the veterans' preference statute, suggesting "an awareness on the part of the lawmakers of the predictable discriminatory impact the preference formula had on women." *Feeney v. Massachusetts*, 451 F. Supp. at 148 n.9 (App. 260). The district court also found that the legislature was, at the least, chargeable with knowledge of the federal discrimination against women in the military. *Id.* at 148 (App. 260).

Third, the court reasoned that the legislature must have known that military entry criteria, which have been and still are more rigorous for women than for men, are not demonstrably related to an individual's fitness for civilian public service. While insufficient by itself to show intent to discriminate, this was "one additional circumstance bearing on the question of discriminatory intent." *Id.* at 148 (App. 261).

Fourth, the court considered the heavily disproportionate impact of the statute on women. *Cf. Castaneda v. Partida*, 430 U.S. 482 (1977). It emphasized that although

disproportionate impact standing alone was not enough to show discriminatory intent, impact could be considered along with other indicia of intent. *Feeney v. Massachusetts*, 451 F. Supp. at 146 (App. 257) (citing *Washington v. Davis*, 426 U.S. at 242).

Finally, the district court considered the fact that, unlike the defendants in *Washington v. Davis*, Massachusetts had made no showing of any affirmative efforts to remedy the devastating impact the statute had on women. Again, the court noted, "[w]e emphasize that our finding of discriminatory intent is not based solely on the Commonwealth's failure to show affirmative efforts to recruit women. This is merely one of the factors we rely on in considering the totality of the circumstances." *Feeney v. Massachusetts*, 451 F. Supp. at 149 n.15 (App. 264).

These five factors are all objective indicia of intent. This Court has recognized the importance of objective evidence on the question of intent. *See, e.g., Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266-68 (1977); *Washington v. Davis*, 426 U.S. at 253 (Stevens, J., concurring); *Swann v. Charlotte-Mecklenberg Board of Education*, 402 U.S. 1, 18 (1971). As the Fifth Circuit recently reasoned, "[t]he most effective way to determine whether a body intended to discriminate is to look at what it has done." *United States v. Texas Education Agency*, 579 F.2d 910, 914 (5th Cir. 1978); *see also NAACP v. Lansing Board of Education*, 559 F.2d 1042, 1046-48 (6th Cir.), *cert. denied*, 434 U.S. 997 (1977).

Objective evidence is particularly critical in reviewing legislative action because the subjective motivation of a legislature in passing a law is difficult, if not impossible,

to ascertain. An examination of the natural, foreseeable and inevitable effects of legislative action on a clearly identifiable protected class may produce the most reliable and probative evidence of intent. As Mr. Justice Stevens has noted, "[n]ormally the actor is presumed to have intended the natural consequences of his deeds. This is particularly true in the case of governmental action which is frequently the product of compromise, of collective decisionmaking, and of mixed motivation." *Washington v. Davis*, 426 U.S. at 253 (Stevens, J., concurring). See also *Monroe v. Pape*, 365 U.S. 167, 187 (1961); *United States v. Texas Education Agency*, 579 F.2d at 913-14. The court below correctly analyzed the objective factors present in terms of their natural, foreseeable and inevitable effect.

The combined impact of the five factors identified by the district court—the facial non-neutrality of the statute; the history indicating the legislature's awareness of the devastating impact on women; the absence of any relationship between civil service job performance and the gender-based federal military entrance requirements; the statistical evidence that the statute excludes women from a wide range of desirable civil service jobs; and the absence of any affirmative effort by the State to overcome this inevitable effect on women—lead ineluctably to the conclusion that Massachusetts chose to benefit veterans by intentionally sacrificing on a grand scale the career opportunities of women. *Feeney v. Massachusetts*, 451 F. Supp. at 150 (App. 265). The *Washington v. Davis* requirement of intent thus has been securely satisfied in this case. See *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. at 266 (drawing a distinction between impact alone and impact plus other evidence bearing on intent).

III

The district court correctly found that the Massachusetts veterans' preference statute unconstitutionally denies to women the equal protection of the laws.

Gender-based classification can withstand constitutional scrutiny only when it is shown to serve "important governmental objectives" and is "substantially related to the achievement of those objectives."¹² *Craig v. Boren*, 429 U.S. 190, 197 (1976); see *Califano v. Goldfarb*, 430 U.S. 199 (1977). Since this Court's 1971 decision in *Reed v. Reed*,

12. The Solicitor General asserts that the State should have an opportunity to show the statute would have been enacted "even if it had no effect on women". Brief for United States as *Amicus Curiae* at 40. This argument relies on cases which offer no support for permitting such a defense in this case, and should be rejected. For example, *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, which involved a specific zoning decision, merely suggested the relevance of this "same action" defense in "a case of [that] kind." 429 U.S. at 270-71 n.21 (dictum). There, if it had been necessary, the court could have examined the focused application of the relevant administrative procedure to determine whether the injury would have occurred "even had the impermissible purpose not been considered." *Id.* See also *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977) (specific school board decision not to rehire individual teacher).

In contrast, the instant case involves a broad legislative classification in the statute itself, and not one peculiar application. In view of the nature of the legislative process, it would be pure conjecture whether the same law would have been approved under different circumstances. Such speculation is particularly inappropriate where, as here, sex-based assumptions and stereotypes are so deeply imbedded in the decision-making process.

Also inapposite are the other cases cited by the Solicitor General, which apply a "but for" test in the context of determining remedies for constitutional violations. See *Carey v. Piphus*, 435 U.S. 247 (1978); *Dayton Board of Education v. Brinkman*, 433 U.S. 406 (1977).

In any event, even if appellants did have the burden of proof asserted by the Solicitor General, they clearly have failed to satisfy it here, and would be unable to do so given the history of the Massachusetts veterans' preference system.

404 U.S. 71 (1971), the only situation in which gender-based classification has survived constitutional challenge has been where the classification is reasonably designed to compensate women for the effects of prior discrimination. See, e.g., *Califano v. Webster*, 430 U.S. 313 (1977).

The "heightened scrutiny" applied by this Court to gender-based classifications is particularly appropriate where, as here, the challenged classification results in an absolute and permanent denial to women of equal access to a broad range of the most desirable public employment opportunities. Although this Court has never characterized public employment as a "fundamental interest," it has demonstrated special sensitivity to discrimination against women in employment. See, e.g., *Nashville Gas Co. v. Satty*, 434 U.S. 136, 142 (1977); *Stanton v. Stanton*, 421 U.S. 7, 14-15 (1975); *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975); *Frontiero v. Richardson*, 411 U.S. 677, 689 n.22 (1973).

The fact that the heightened review standard has been developed in cases involving explicitly gender-based classification does not diminish its appropriateness in the instant case of implicitly gender-based discrimination. As discussed above, the discrimination at issue in this case results from a congeries of laws, regulations and practices which define the class of "veterans" as 98 per cent male. Like in *Reed*, *Frontiero* and *Stanton*, the discrimination here is by operation of law and results from sex-based assumptions and stereotypes which type-cast women as inferior and subordinate to men. Further, the challenged preference constitutes a marked departure from the firmly

rooted principle that "advancement sanctioned, sponsored, or approved by the State should ideally be based on individual merit or achievement, or at the least on factors within the control of an individual." *Regents of University of California v. Bakke*, 98 S.Ct. at 2785 (Brennan, White, Marshall and Blackmun, JJ., concurring in the judgment in part and dissenting). To justify such a departure, this Court's review under the Fourteenth Amendment should be searching.

Accordingly, at a minimum, Massachusetts must demonstrate that its statute is "substantially related" to the accomplishment of "important governmental objectives" if the challenged veterans' preference law is to pass constitutional scrutiny. This inquiry includes consideration of the suitability of the particular means chosen by the state to achieve its objective. See *Craig v. Boren*, 429 U.S. at 211 (Powell, J., concurring); *Frontiero v. Richardson*, 411 U.S. at 688-90; *Feeney v. Massachusetts*, 451 F. Supp. at 145 (App. 255); Note, "The Supreme Court 1976 Term," 91 *Harv. L. Rev.* 1, 184, 187 (1977).

Massachusetts argues that the governmental objectives for its veterans' preference statute were: "(1) to reward those who have sacrificed in the service of their country; (2) to assist veterans in their readjustment to civilian life; and (3) to encourage patriotic service." Brief for Appellants at 24. An examination of each of these interests, however, reveals that the statutory scheme of preference chosen by the state does not achieve these objectives in a manner compatible with the equal protection requirement. The challenged law fails to satisfy the fair and substantial relationship test because it is both underinclusive and over-

inclusive. *Cf. Jimenez v. Weinberger*, 417 U.S. 628, 637 (1974).

With respect to the first asserted objective, *i.e.*, "rewarding" those who have sacrificed in the service of their country, the statutory preference does not bestow a benefit upon all veterans but limits the reward to those who seek employment in the public sector. Nor does the statutory classification relate the reward to any measurement of the sacrifice, since it rewards veterans without regard to the type or length of their service. While these factors alone might not indicate the constitutional vulnerability of the preference scheme, they do provide the backdrop for the critical flaw: the Massachusetts statute imposes the cost of its unfocused reward disproportionately "upon female competitors for scarce higher echelon public jobs." *Fleming & Shanor, supra*, 26 *Emory L.J.* at 49; *see Blumberg, supra*, 26 *Buffalo L. Rev.* at 69.

Nor does the challenged statute fairly and substantially serve the objective of assisting veterans in their readjustment to civilian life. No correlation has been demonstrated between the grant of the absolute, permanent preference and the veteran's need for rehabilitation or reintegration into the workforce. Evidence produced in this case underscores this point. On three of the eligibility lists examined, two-thirds of the veterans receiving preference had been discharged more than 20 years ago (App. 106, 150-151, 169-170) (of the 99 veterans for whom discharge dates were available, 42 left the military in the 1940's, and 21 in the 1950's). Clearly, the Massachusetts preference persists far beyond the point where there can

be any tenable claim that a rehabilitative or reintegrative purpose is served.¹³

Finally, there is even less of a relationship between the challenged classification and the asserted objective of encouraging patriotic service.¹⁴ It is far too speculative to assume that the *ex post facto* grant of preference served as any inducement for the thousands of male veterans who enlisted in anticipation of the draft; certainly it did not for those who were drafted. "It would be surprising if any statistically significant group would risk the dangers of war in order to gain preferential treatment in public employment." *Fleming & Shanor, supra*, 26 *Emory L.J.* at 50 (footnote omitted).

At best, the Massachusetts statute furthers the asserted government objectives—assuming, *arguendo*, that they are legitimate—only in the grossest of ways. As the district court noted, "[s]uch a broad-brush approach may be administratively convenient, but mere administrative convenience is not a legitimate basis for benefiting one identifiable class at the expense of another." *Feeney v. Massachusetts*, 451 F. Supp. at 145 (App. 255); *see Reed v. Reed*, 404 U.S. at 76-77.

The district court correctly found that the correlation between the challenged statute and the achievement of the

13. Indeed, the more recent veterans who arguably need reintegration most are denied its benefits because the eligibility lists are so heavily weighted with senior veterans.

14. The legitimacy of this objective is subject to question, since the Armed Forces is more appropriately a federal than a state concern. *Fleming & Shanor, supra*, 26 *Emory L.J.* at 61-63; *Blumberg, supra*, 26 *Buffalo L. Rev.* at 15 n.71.

asserted objectives is not grounded "on a convincing factual rationale." *Feeney v. Massachusetts*, 451 F. Supp. at 145 (App. 255). Massachusetts has failed to tailor its veterans' preference statute carefully to constitutionally accomplish the purposes it sought to achieve. The challenged statute is both overinclusive and underinclusive in its scope and operation and it does not bear a fair and substantial relationship to any important government objectives advanced by the State. This Court has struck down other ill-drafted statutes on numerous occasions. *See, e.g., Craig v. Boren*, 429 U.S. 190 (1976) (statute insufficiently tailored to the purpose of promoting highway safety); *Weinberger v. Wiesenfeld*, 426 U.S. 636 (1975) (classification not reasonably related to objective of providing children with parental care). It should do so again here.

The extreme form of veterans' preference enacted by the Massachusetts legislature does not represent a tolerable balance between the conflicting interests of two definable classes of individuals—aiding veterans and assuring equal employment opportunities to women. *Feeney v. Massachusetts*, 451 F. Supp. at 150 (App. 265); *Anthony v. Massachusetts*, 415 F. Supp. at 496 (App. 213). Its result is to make it "virtually impossible for a woman, no matter how talented, to obtain a state job that is also of interest to males." *Feeney v. Massachusetts*, 451 F. Supp. at 151 (App. 268) (Campbell, J., concurring). The district court was correct in concluding that the Massachusetts absolute, permanent preference system is too far sweeping to survive constitutional review.

Conclusion

For the reasons stated above, *amici* respectfully submit that the judgment and order of the District Court for the District of Massachusetts should be affirmed.

Respectfully submitted,

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